Supreme Court, U.S.
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No. 06-269

In The
Supreme Court of the United States

UNITED DISPOSAL OF BRADLEY, INC.
and MUNICIPAL TRUST & SAVINGS BANK
AS TRUSTEE UNDER TRUST 0799,

Petitioners,

vs.

ILLINOIS POLLUTION CONTROL BOARD and
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,

Respondents.

On Petition For Writ Of Certiorari
To The State of Illinois, Appellate Court,
Third District

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Whether a permit restriction based on geographic origins of waste, limiting a business to the boundaries of a particular municipality is void under the Commerce Clause.

Whether there is an exception to the Commerce Clause strict scrutiny test for geographically based restrictions on articles of commerce when the state imposes the geographical restriction in a permit, rather than by law, ordinance or regulation.

Whether there is an exception to due process for appeals from administrative agencies, such that on an administrative agency should be given deference, more so than courts, in interpreting and applying the U.S. Constitution, and be reviewed under a deferential manifest weight rather than *de novo* standard.

PARTIES TO THE PROCEEDING

The parties to the proceeding are:

United Disposal of Bradley, Inc., an Illinois corporation;

Municipal Trust & Savings Bank as Trustee under Trust 0799, an Illinois land trust;

The Illinois Pollution Control Board, an Illinois State administrative review agency; and

The Illinois Environmental Protection Agency, an Illinois State agency.

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CITATION OF REPORTS OF OPINIONS ENTERED IN THE CASE

United Disposal of Bradley, Inc. v. Illinois Pollution Control Board, 363 Ill.App.3d 243, 842 N.E.2d 1161, 2006 Ill. App. Lexis 8, 299 Ill. Dec. 809 (January 13, 2006). *United Disposal of Bradley, Inc. v. Illinois Environmental Protection Agency*, PCB 03-235, 2004 Ill. Env. Lexis 337 (June 17, 2004).

BASIS FOR SUPREME COURT JURISDICTION

On January 13, 2006, the Illinois State Appellate Court entered judgment. Appendix App. 1-13. Petitioners United Disposal of Bradley, Inc. ("United Disposal") and Municipal Trust & Savings Bank as Trustee under Trust 0799 ("Trustee"), seek review of the Illinois State Appellate Court's judgment on a writ of certiorari.

Following the Illinois State Appellate Court's decision, on February 1, 2005, Petitioners timely filed their Affidavit of Intent to File a Petition for Leave to Appeal with the Illinois Supreme Court. Appendix App. 65-66. On February 17, 2006, the Petitioners timely filed their Petition for Leave to Appeal to the Illinois Supreme Court. The Illinois Supreme Court entered its judgment on May 24, 2006, denying a petition for leave to appeal the Illinois State Appellate Court's decision in this matter. Appendix App. 52. The present petition is timely filed under 28 U.S.C. §1257 and Rule 13 of this Court, having been filed 90 days from the date of the Illinois Supreme Court's denial of appeal on May 24, 2006.

This Court has jurisdiction under 28 U.S.C. §1257(a) to review on a writ of certiorari the judgment of the Illinois Appellate Court in this case.

CONSTITUTIONAL PROVISIONS INVOLVED IN THIS CASE

The Constitution of the United States, Article I, Section 8, Clause 3 Dormant Commerce Clause and the XIV Amendment, Due Process Clause.

STATEMENT OF THE CASE

United Disposal and Trustee operate and own, respectively, a municipal waste transfer station in the Village of Bradley, State of Illinois. A municipal waste transfer station is a facility at which garbage trucks, such as packers and roll-offs, deposit waste on a concrete floor, inside a building. The waste is then transferred to semi-truck trailers to be hauled longer distances to landfills.

When a pollution control facility is permitted in Illinois, it must receive a development permit and an operational permit from the Illinois Environmental Protection Agency (Illinois EPA). (415 ILCS 5/39). United Disposal and Trustee have a development and operational permit from the Illinois EPA, however, both contain a geographic restriction that the transfer station can only accept waste from within the municipal boundaries of the Village of Bradley. Specifically, their operational permit contains Condition No. 9, stating that: ***No waste generated outside the municipal boundaries of the Village of Bradley may be accepted at this facility*** . . . Appendix App. 53-64, 56.

After United Disposal and Trustee had received local approval for their transfer station, after they received a development permit from the Illinois EPA, and after they had submitted an application for an operational permit with Illinois EPA (but prior to that operational permit being granted), the Illinois General Assembly corrected the language the then-law that allowed Illinois EPA to impose geographic restrictions on waste. Illinois Law previously distinguished between facilities that accepted waste from within a local jurisdiction, which were referred to as "non-regional," and those facilities that did not operate with such a restriction, which were referred to as "regional." 415 ILCS 5/3.32, 5/39 (1993). *See, Tennsv, Inc. v. Gade,* 1993 U.S. Dist. Lexis 10403 (S.D. Ill. 1993). App. 67-72.

On December 22, 1994, as a result of an unpublished decision of a U.S. District Court in Illinois finding the distinction a *per se* violation of the U.S. Commerce Clause, the Illinois General Assembly removed the "regional" and "non-regional" distinction from the Act, so that it would no longer discriminate between facilities on the basis of where the waste was generated. 415 ILCS 5/3.32, 5/39 (1994). That decision was *Tennsv, Inc. v. Gade*, 1993 U.S. Dist. Lexis 10403. Appendix App. 67-72. The discrimination under the old version of the law, was that "regional" facilities had to follow a zoning-like procedure called "siting" under state law, 415 ILCS 5/39.2, prior to applying for a permit from Illinois EPA, whereas, "non-regional" facilities were required to comply with the local host-government's distinct zoning and land use procedural requirements. United Disposal and Trustee had obtained local approval from the Village of Bradley under Bradley's zoning and land use laws, rather than Section 5/39.2 of the Illinois Environmental Protection Act, and its was, thus, permitted by Illinois EPA as a "non-regional" facility.

On March 27, 2003, United Disposal and Trustee submitted to the Illinois EPA an "Application for Modification to Operation Permit 1994-306-OP" asking the Illinois EPA to remove the permit condition limiting their waste acceptance to the Village of Bradley. The Application was denied on May 15, 2003, on the basis the Application did not contain the Village of Bradley's "siting" approval under 415 ILCS 5/39.2 and because the Application did not seek the geographical restriction to be similarly removed from its Development Permit. On June 19, 2003, Petitioner-Appellants timely filed a petition seeking Illinois Pollution Control Board (IPCB) review of the Illinois EPA's May 15, 2003 denial of its request to permit modification.

In the IPCB proceeding, cross-motions for summary judgment were filed by the parties in December 2003. The following material facts were undisputed. Waste is an article of commerce. United Disposal, in addition to operating the transfer station, has a hauling business in which it has customers and business opportunities outside the Village of Bradley and outside the State of Illinois. The permit condition geographically restricting United Disposal's operation of the transfer station, also restricts its hauling company operations, as it is purportedly unable to haul waste for transfer at the transfer station based on origin of waste. There is no evidence in the record that removal of the origin of waste permit restriction would have any effect on any physical or operational aspect of the transfer station or any negative impact on the community. The Village of Bradley and surrounding community fully support the removal of the permit restriction.

The Illinois Pollution Control Board rendered its decision on the cross-motions for summary judgment on June 17, 2004, granting the Illinois EPA's motion and

denying Petitioners-Appellants' motion. Appendix App. 14-51. The Illinois Pollution Control Board held that, although a violation of the Commerce Clause, the waste-origin geographic permit restriction was allowable under the *Pike* test. A timely appeal to the Third District Appellate Court was filed on July 16, 2004. The Third District Appellate Court entered its Opinion upholding the decision of the IPCB on January 13, 2006, and holding that it should give deference to the IPCB's legal determination, by reviewing United Disposal's and Trustee's appeal from the summary judgment decision that presented a Constitutional issue under a manifest weight, rather than *de novo* standard.

The result from the IPCB and the Illinois Appellate Court conflicts with tests proscribed by the Supreme Court for review of a Commerce Clause question. *C&A Carbone v. Town of Clarkstown*, 511 U.S. 383, 390, 114 S.Ct. 1677, 1682 (1994); *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dept. of Natural Resources*, 119 L.Ed.2d 139, 112 S.Ct. 2019, 2024 (1992) (state may not prohibit private landfill operators from accepting solid waste that originates outside the county in which their facilities are located); *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 90 S.Ct. 844 (1970).

The result conflicts with all similar reported decisions in which a geographically imposed restriction on business was found to be in violation of the Commerce Clause and invalidated. *Oregon Waste Systems, Inc. v. Department of Environmental Quality of Oregon*, 511 U.S. 93, 114 S.Ct. 1345 (1994); *Northeast Sanitary Landfill, Inc., et al. v. South Carolina Dept. of Health and Enviro, et al.*, 843 F.Supp. 100, 105, 109 (D. S.C. 1992) (permit condition restricting waste flow to landfill from several county

region invalid); *Fort Gratiot Sanitary Landfill, Inc.*, 119 L.Ed.2d 139, 112 S.Ct. 2019, 2014 (1992); *City of Philadelphia v. New Jersey*, 437 U.S. 617, 98 S.Ct. 2531 (1978) (State cannot prohibit private landfill operators from accepting waste outside the state of New Jersey); *Dean Milk Co. v. Madison*, 340 U.S. 349, 71 S.Ct. 295 (1951) (unlawful for City to regulate sale of milk based on whether it had been processed at a plant within five mile radius of central square Madison); *Ecological Systems, Inc. v. The City of Dayton*, 2002 Ohio 388 (OH 2nd Dist. 1992), app. denied, 2002 Ohio 2852, 769 N.E.2d 873 (2002) (ordinance prohibiting waste water from outside city limits to be brought into city POTW is patently discriminatory); *Dutchess Sanitation Serv., Inc. v. Town of Plattekill*, 51 N.Y.2d 670, 417 N.E.2d 74 (N.Y. App. Ct. 1980).

The result also conflicts with the well established law on standard of review, in effect, proscribing more legal authority to a state agency (Illinois Pollution Control Board) than a court of law, by giving the IPCB deference on construction of law and the application of the Commerce Clause. All other courts recognize the review should be *de novo* under circumstances of cross-motions for summary judgment and/or review of a U.S. Constitutional issue, as were presented in this case.

In addition to the inconsistency of the published Illinois Appellate Court decision in this case with the established law on Commerce Clause and standards of review, the decision results in a newly created exception to the protections of the Commerce Clause: permits. Under the Illinois Appellate Court's decision in this case, a State of Illinois agency may impose waste-origin restrictions in a permit, avoid any ramifications of the Commerce Clause,

and buffer itself with deference on review should the permit be challenged.

United Disposal and Trustee respectfully request that the United States Supreme Court grant this petition for writ of certiorari to: conform the Illinois Appellate Court's decision to existing Supreme Court authority and to correct its misapplications of the Commerce Clause and due process, reconcile the distinctions created by the Illinois Appellate Court's decision in both the application of the Commerce Clause and the due process to which appellants from administrative agencies are entitled, and close the exceptions created by the Illinois Appellate Court allowing a waste-origin restriction on commerce imposed by permit rather than statute or ordinance and giving deferential review to a state agency on issues of Constitutional Law.

ARGUMENT

A. The Illinois Court of Appeals fails to follow the Opinion of the Supreme Court and conflicts with decisions of other state and federal courts in finding a waste-origin restriction on business to be acceptable under the Commerce Clause.

United Disposal and Trustee applied to the Illinois EPA to remove a waste-origin based permit condition from their operating permit. The Illinois EPA denied that request and United Disposal and Trustee, as required by Illinois law, appealed that denial to the IPCB. The IPCB, on cross-motions for summary judgment, applied the *Pike* test rather than strict scrutiny to its review of United Disposal and Trustee's assertion that Illinois EPA's waste-origin

permit condition violates the Commerce Clause. The Illinois Appellate Court upheld the IPCB's misapplication of the law.

The U.S. Constitution provides a grant of authority to Congress to "regulate Commerce . . . among the several States." Art. I, §8, cl. 3. It is well established that the Commerce Clause, also embodies a negative command forbidding the States from discriminating against inter-state trade. *Associated Indus. v. Lohman,* 511 U.S. 641, 114 S.Ct. 1815, 1820 (1994), *see, e.g., New Energy Co. v. Limbach,* 486 U.S. 269, 273, 108 S.Ct. 1803, 1807 (1988). The Supreme Court has interpreted the Commerce Clause to invalidate local laws that impose commercial barriers or discriminate against an article of commerce by reason of its origin or destination. *C&A Carbone v. Town of Clarkstown,* 511 U.S. 383, 390, 114 S.Ct. 1677, 1682 (1994).

The invalidation of laws that discriminate based on origin or destination under the Commerce Clause applies to intra- as well as inter-state commerce. *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dept. of Natural Resources,* 119 L.Ed.2d 139, 112 S.Ct. 2019, 2024 (1992) (state may not prohibit private landfill operators from accepting solid waste that originates outside the county in which their facilities are located).

It is uncontested that waste is an article of commerce and that the subject permit condition, on its face, restricts waste flow based on origin. Given those facts, alone, the Illinois Appellate Court should have applied the strict scrutiny test to remove the discriminatory operating permit condition. *Oregon Waste Systems, Inc. v. Department of Environmental Quality of Oregon,* 511 U.S. 93, 114 S.Ct. 1345 (1994); *Northeast Sanitary Landfill, Inc., et al.*

v. South Carolina Dept. of Health and Enviro, et al., 843 F.Supp. 100, 105, 109 (D. S.C. 1992) (permit condition restricting waste flow to landfill from several county region invalid); *Fort Gratiot Sanitary Landfill, Inc.*, 119 L.Ed.2d 139, 112 S.Ct. 2019, 2014 (1992); *City of Philadelphia v. New Jersey*, 437 U.S. 617, 98 S.Ct. 2531 (1978) (State cannot prohibit private landfill operators from accepting waste outside the state of New Jersey); *Dean Milk Co. v. Madison*, 340 U.S. 349, 71 S.Ct. 295 (1951) (unlawful for City to regulate sale of milk based on whether it had been processed at a plant within five mile radius of central square Madison); *Ecological Systems, Inc. v. The City of Dayton*, 2002 Ohio 388 (OH 2nd Dist. 1992), app. denied, 2002 Ohio 2852, 769 N.E.2d 873 (2002) (ordinance prohibiting waste water from outside city limits to be brought into city POTW is patently discriminatory).

Instead, without any explanation, other than, perhaps, the Illinois Appellate Court's use of the manifest weight standard to review U.S. Constitutional issues of law resulting from motions for summary judgment, the IPCB and Illinois Appellate Court skipped strict scrutiny and applied the test first identified in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 90 S.Ct. 844 (1970). Appendix App. 7-8, 42-43. The *Pike* test should be applied only if the law at issue is *not* patently discriminatory on its face.

In this case, the permit condition is clearly, undisputedly, and patently discriminatory on its face, stating: ***No waste generated outside the municipal boundaries of the Village of Bradley may be accepted at this facility*** . . . Appendix App. 56.

In addition to be patently discriminatory, the very law which once provided the authority for the discriminatory

permit condition at issue was found to be in violation of the Commerce Clause in the unpublished, but herein relevant, decision of *Tennsv v. Gade*, 1993 U.S. Dist. Lexis 10403 (S.D. Ill. 1993). Appendix App. 67-72. Although *Tennsv* was acknowledged by the Illinois Appellate Court in this case, without criticism, it was not applied in the Court's analysis or distinguished in this case. Appendix App. 5-6. The decision in *Tennsv* and the subsequent modification by the Illinois General Assembly of the Act to remove the discriminatory statutory provisions rendered the subject permit condition void *ab initio*. However, even if the constitutional analysis is completed for the permit condition, the subject discriminatory permit condition is, on its face, discriminatory and violates the Commerce Clause.

In its holding, Illinois Appellate Court creates an exception to past Supreme Court and other precedent involving the Commerce Clause, and allows a permit condition to restrict a business based on origin of waste and ignore strict scrutiny review, where a law, statute, ordinance, or regulation cannot. The Illinois Appellate Court explains this strange result by stating that none of the long-line Commerce Clause cases invalidating waste-origin based restrictions "gave the improperly restricted party such a choice" to be discriminated against or not. Appendix App. 67-72. The Appellate Court explained that this "is not a case of unconstitutional economic protectionism. This case involves a private entity that made a choice to forego the siting process more than 12 years ago when it had that option." Appendix App. 9.

The Illinois Appellate Court relies on United Disposal's, Trustee's and the Village of Bradley's decision to follow the local land use rules, rather than the Illinois

Environmental Protection Act Section 5/39.2's "citing," as then allowed by the now defunct statute that distinguished between "regional" and "non-regional" facilities, to buffer the offensive permit language from state action.

In other words, the subject Appellate Court decision found that by applying for a permit that ultimately contained a *per se* discriminatory condition, United Disposal and Trustee *waived* the discrimination. This rationale, however, does not coincide with the rule of law that and administrative action can be challenged at any time on a constitutional ground. *See, Lutheran Church v. New York,* 27 A.2d 237, 278 N.Y.S.2d 1 (N.Y. App. Div. 1967). Moreover, how the discriminatory restriction came into being is irrelevant and the fact that a restricted party agreed to the discriminatory restriction is of no consequence, because the party cannot be estopped from asserting the unconstitutionality of the restriction. *Northeast Sanitary Landfill*, 843 F.Supp. at 104.

The Illinois Appellate Court decision is contrary to the decisions of every court who has addressed this issue in a published decision. *See, e.g., Northeast Sanitary Landfill, Inc.*, 843 F.Supp. 100, 105, 109, *Fort Gratiot Sanitary Landfill, Inc.,* 119 L.Ed.2d 139, 112 S.Ct. 2019, 2014, *City of Philadelphia,* 437 U.S. 617, 98 S.Ct. 2531, *Dean Milk Co.*, 340 U.S. 349, 71 S.Ct. 295, *Dutchess Sanitation Serv., Inc.*, 51 N.Y.2d 670, 417 N.E.2d 74.

Finally, even if, *in arguendo,* the *Pike* test should be applied in this case, the Illinois Appellate Court did not apply it correctly. In *Pike* the Supreme Court held that in cases where the discriminatory restriction is *not* patently offensive and violative of the Commerce Clause and the restriction imposes equal burdens on interstate and

intrastate commerce, a balancing test is employed. The test states that where there is only an "incidental burden" on commerce in relation to the local benefits *and* a "legitimate public purpose," a discriminatory restriction may be tolerated. *Pike,* 397 U.S. at 142, 90 S.Ct. at 847. In this case, the Illinois Appellate Court applied the test incorrectly as there is no evidence in the record to compare the burden to the benefit of the discriminatory condition, and neither the IPCB, Illinois EPA, nor the Illinois Appellate Court identify a "legitimate public interest."

With respect to the "legitimate public interest" prong of the test, despite lacking any evidence on which to base its finding, the Appellate Court found, contrary to the undisputed facts and precedent, that "the regulation of solid waste disposal for the protection of public health and safety is a legitimate governmental purpose." Appendix App. 8. However, the subject permit condition does not regulate waste "disposal" as a transfer station is merely an intermediary stop in the transportation of waste to its final resting, treatment or recycling location. Further, there was no evidence before the Appellate Court of any health and safety purpose to the restriction, and the burden was on the Illinois EPA to have developed that evidence, if any.

Moreover, the precedent is clear that whether waste enters a transfer station from one municipality or five municipalities is of no consequence to health and safety. *Northeast Sanitary Landfill*, 843 F.Supp. at 110. In other words, there is no health and safety protection derived from preventing residential waste from Ottawa, Illinois from entering a transfer station located in Bradley, Illinois, as there is no substantive difference, at least such that would trigger a health and safety concern, between

the types of municipal solid waste generated in the various residences throughout this and other states. There is simply no evidence in the record, and the Illinois EPA carried the burden of proof, of any benefits resulting from the discriminatory provision.

The Illinois Appellate Court's decision in this case, and newly created exception to the Commerce Clause, is inconsistent with Supreme Court precedent, inconsistent with the precedent of other courts following the Supreme Court's direction on a Commerce Clause analysis, and creates a new exception to the Commerce Clause that allows a state to "back door" restrictions on articles of commerce based on their origin, through imposition of those restrictions in a permit. Not only is the Illinois Appellate Court's decision in this case wildly different from precedent to date, but it creates a new rule that is entirely inconsistent with that precedent, which has implications for any business which requires a permit from a state to do business. The review of the Illinois Appellate Court's decision through a writ of certiorari will yield a result for these petitioners and others that conform the Illinois Appellate Court's decision to existing Supreme Court authority, correct its misapplications of the Commerce Clause, reconcile the distinctions it created for review of a permit as opposed to a law, statute, ordinance or regulation, and close exception it created to allow the imposition of origin based restrictions waste and other articles of commerce by permit.

B. The Illinois Court of Appeals fails to follow the Opinion of the Supreme Court and conflicts with decisions of each state in creating an exception to the standard of review.

It is well established by the Supreme Court, in prior Illinois State Court decisions, and throughout the United States, that the standard of review for decisions made on summary judgment is *de novo. Home Ins. Co. v. Cincinnati Ins. Co.*, 213 Ill.2d 307, 315, 821 N.E.2d 269 (2004) (citation omitted); *see also, Extermitech, Inc. v. Glasscock, Inc.*, 2006 Ala. Lexis 192 (Ala. 2006), *Staudenmaier v. Municipality of Anchorage,* 2006 Aka. Lexis 114 (Aka. 2006), *Duncan v. Scottsdale Med. Imaging, Ltd.,* 205 Ariz. 306 (Ariz. 2003), *Lyle v. Warner Bros. TV Prods.*, 38 Cal.4th 264 (Cal. 2006), *Vigil v. Franklin,* 103 P.3d 322 (Colo. 2004), *Miller's Pond Co., LLC v. City of New London,* 273 Conn. 786 (Conn. 2005), *Handler Corp. v. Tiapechco,* 2006 Del. Lexis 304 (Del. 2006), *Williams v. D.C.,* 2006 D.C. App. Lexis 353 (D.C. 2006), *Fla. Bar v. Greene,* 926 So.2d 1195 (Fla. 2006), *Northwest Carpets, Inc. v. First Nat'l Bank,* 280 Ga. 535 (Ga. 2006), *Haole v. State,* 2006 Haw. Lexis 421 (Haw. 2006), *Cascade Auto Glass, Inc. v. Idaho Farm Bureau Ins. Co.*, 141 Idaho 660 (Idaho 2005), *Big Sky Excavating, Inc. v. Ill. Bell Tel. Co.*, 217 Ill.2d 221 (Ill. 2005), *Univ. of S. Ind. Found. v. Baker,* 843 N.E.2d 528 (Ind. 2006), *Kau Kau Take Home No. 1 v. City of Wichita,* 135 P.3d 1221 (Kan. 2006), *Gainsco Cos. v. Gentry,* 191 S.W.3d 633 (Ky. 2006), *Hill v. Shelter Mut. Ins. Co.*, 2006 La. Lexis 2127 (La. 2006), *Penn v. FMC Corp.*, 2006 ME 87 (Me. 2006), *Medical Mut. Liab. Ins. Soc'y v. Goldstein,* 388 Md. 299 (Md. 2005), *Groncki v. Detroit Edison Co.,* 453 Mich. 644 (Mich. 1996), *Auto-Owners Ins. Co. v. Forstrom,* 684 N.W.2d 494 (Minn. 2004), *Arceo v. Tolliver,* 2006 Miss. Lexis 385 (Miss. 2006), *Highfill v. Hale,* 186 S.W.3d 277

(Mo. 2006), *Vogel v. Intercontinental Truck Body, Inc.*, 2006 MT 131 (Mont. 2006), *Simonian v. Univ. & Cmty. College Sys.*, 128 P.3d 1057 (Nev. 2006), *Progressive N. Ins. Co. v. Concord Gen. Mut. Ins. Co.*, 151 N.H. 649 (N.H. 2005), *C.W. v. Cooper Health Sys.*, 2006 N.J. Super. Lexis 234 (App. Div. 2006), *Ulibarri v. State Corr. Acad.*, 2006 NMSC 9 (N.M. 2006), *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440 (N.C. 2004), *Farmers Ins. Exch. v. Schirado*, 2006 ND 141 (N.D. 2006), *Doe v. Shaffer*, 90 Ohio St.3d 388 (Ohio 2000), *Jacobs Ranch, LLC v. Smith*, 2006 OK 34 (Okla. 2006), *Ieropoli v. AC & S Corp.*, 577 Pa. 138 (Pa. 2004), *McGinity v. Pawtucket Mut. Ins. Co.*, 899 A.2d 504 (R.I. 2006), *Johnson v. Rapid City Softball Ass'n*, 514 N.W.2d 693 (S.D. 1994), *Draper v. Westerfield*, 181 S.W.3d 283 (Tenn. 2005), *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656 (Tex. 2005), *Town of Lunenburg v. Supervisor & Bd. of Governors of the Unorganized Towns*, 2006 VT 71, P5 (Vt. 2006), *Heg v. Alldredge*, 157 Wn.2d 154 (Wash. 2006), *Hawkins v. United States Sports Ass'n*, 2006 W.Va. Lexis 49 (W.Va. 2006), *Dairyland Greyhound Park, Inc. v. Doyle*, 2006 WI 107 (Wis. 2006), *Habco v. L & B Oilfield Serv.*, 2006 WY 91 (Wyo. 2006).

It is also established precedent that in cases in which the appellate review presents no factual disputes and only addresses legal issues, an administrative agency's conclusions are reviewed *de novo*. *Branson v. Department of Revenue*, 168 Ill.2d 247, 659 N.E.2d 961 (1995); *Armour Pharmaceutical Co. v. Department of Revenue*, 321 Ill.App.3d 662, 665-66, 748 N.E.2d 265 (1st Dist. 2001); *Rockwood Holding Co. v. Department of Revenue*, 321 Ill.App.3d 1120, 1123, 728 N.E.2d 519 (1st Dist. 2000); *Land and Lakes v. Pollution Control Board*, 319 Ill.App.3d 41, 743 N.E.2d 188 (3rd Dist. 2000).

Moreover, and most importantly, the precedent providing that the construction of a statute or the U.S. Constitution is a matter of law that is reviewed *de novo*. *Ferrari v. Ill. Dep't of Human Rights*, 351 Ill.App.3d 1099, 1103-1104, 815 N.E.2d 417, 421-422 (4th Dist. 2004), *citing, Boaden v. Department of Law Enforcement*, 171 Ill.2d 230, 237, 664 N.E.2d 61, 65 (1996).

The Appellate Court's decision in this matter ignores all previously well-established precedent for *de novo* review and, in doing so, has deprived United Disposal and Trustee of its property, namely an operational permit unencumbered by waste-origin restrictions. This deprivation was without due process, in violation of the Fourteenth Amendment, and denied petitioners a full review on the Commerce Clause issue presented. Rather than receive a *de novo* review on its property interest, namely its permit, and the Illinois EPA's encumbrance of that permit with a waste-origin based restriction on what waste the petitioners' transfer station can accept, the Illinois Appellate Court (the first court-level review the petitioners received) gave deference to the IPCB (administrative agency) who, in turn, gave deference to the Illinois EPA in denying petitioners' request to remove the waste-origin restriction on its permit.

United Disposal and Trustee were entitled to a *de novo* review on the issue of whether the Commerce Clause invalidates the offending permit condition. Instead, they received a state administrative agency's deferential review finding without any rational, legal or evidentiary basis, that "the geographical limitation on the facility's service area is neutral" and that it "acts within the restraints of the Commerce Clause" despite having a "slight" burden on commerce. Appendix App. 43. Then, rather than a *de novo* review by the Illinois Appellate Court, the Appellate Court

applied a manifest weight of the evidence standard, with deference to the IPCB.

Under this review, the Appellate Court determined that despite the "cataloging [of] numerous commerce clause cases describing the evils of economic protectionism" by petitioners, it did "not find the circumstances surrounding the denial of petitioners' application to be the result of unconstitutional economic protectionism." Interestingly, the Appellate Court adds in its analysis that this was not a case like *Philadelphia v. New Jersey* "in which commerce is blatantly halted at the border." Appendix App. 6, *citing, Philadelphia v. New Jersey*, 437 U.S. 617, 57 L.Ed.2d 475, 98 S.Ct. 2531 (1978).

Apparently, in Illinois, parties are only afforded due process when commerce is stopped at the state border. In this situation, commerce is stopped at a municipal border, which on that smaller scale, is apparently the "slight" impact and Commerce Clause violation that neither the IPCB nor Illinois Appellate Court felt worthy of *de novo* review. Unfortunately, that "slight" burden becomes a *Philadelphia v. New Jersey* situation, as soon as other facilities face a similar "within boundary" restriction. This case carves out an exception that now serves as precedent in Illinois and other states to "backdoor" the Commerce Clause through a permit, and buffer the state from complaints with assertions of waiver against the permitees and a deferential standard of review.

To allow and not reverse the standard as presented by the Illinois Appellate Court in its published decision in this case would promote a lopsided review of cases involving only issues of law, resulting in favoritism and deference to an administrative agency over the trial courts on

legal issues and, even more importantly, on U.S. Constitutional issues. The rule for deference with administrative agencies is founded on the idea that they have a certain expertise in the technical areas of their reviews. However, that is necessarily a fact-dependent rule, and in this case, the reviewing administrative agency, the IPCB's decision required no specialized technical, scientific or administrative expertise. Rather it was one of the IPCB's *first* decisions applying the U.S. Constitution, and involved only the determination of a question of law. Certainly an administrative tribunal with a certain technical expertise but no necessary legal training is not entitled to more deference on questions of statutory and constitutional interpretation than a trial court. However, that is the new standard created by the Illinois Appellate Court in its decision herein, albeit contrary to precedent, and it should be reversed.

Review of the Illinois Appellate Court's decision in this case through granting this writ of certiorari will provide the petitioners due process and a full review on the Constitutional issues involved in this matter, conform the Illinois Appellate Court's decision to existing Supreme Court authority, correct the Illinois Appellate Court's misapplications of the Commerce Clause, reconcile the distinctions it created for review of a permit as opposed to a law, statute, ordinance or regulation, and close exceptions it created to allow the imposition of origin based restrictions waste and other articles of commerce by permit and to avoid *de novo*

review on appeal if an administrative agency has first reviewed one's Constitutional issue.

Respectfully submitted,

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United Disposal of Bradley, Inc.
and Municipal Trust & Savings
Bank as Trustee under Trust 0799

842 N.E.2d 1161

No. 3-04-0536

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2006

UNITED DISPOSAL OF BRADLEY, INC. and MUNICIPAL TRUST & SAVINGS BANK as Trustee under Trust 0799,	) Petition for Review of) Order of the Illinois Pollution Control Board dated) June 17, 2004) (Filed Jan. 13, 2006)
Petitioners-Appellants,	) No. PCB 03-235
v.	) Appeal from a Decision of) the Illinois Pollution) Control Board
THE POLLUTION CONTROL BOARD and THE ENVIRONMENTAL PROTECTION AGENCY,	)
Respondents-Appellees.	)

PRESIDING JUSTICE SCHMIDT delivered the opinion of the court:

This appeal comes to us on a petition for review of an order of the Illinois Pollution Control Board (the Board) dated June 17, 2004. Petitioners, United Disposal of Bradley, Inc. (United Disposal), and Municipal Trust & Savings Bank, sought to have a geographical limitation removed from their operating permit. The Illinois Environmental Protection Agency (the Agency) denied the petitioners' request. The Board affirmed that denial. Petitioners appeal.

BACKGROUND

In June of 1994, petitioners filed an application with the Agency to obtain a development permit for a local waste transfer station. On September 21, 1994, a development permit was issued by the Agency that contained Special Condition No. 9, which stated, "No waste generated outside the municipal boundaries of the Village of Bradley may be accepted at this facility." Critical facts regarding this application and the statutory scheme under which it was issued will be discussed below to reduce repetition.

On December 9, 1994, the petitioners' facility was completed. On January 19, 1995, the Agency issued an operating permit that also contained Special Condition No. 9.

On March 31, 2003, petitioners filed an application for modification, asking the agency to remove Special Condition No. 9 from their operating permit. On May 15, 2003, the Agency directed correspondence to the petitioners informing them that their application was denied. Specifically, the Agency informed the petitioners that their application was "deemed not to have been filed because it fail[ed] to set forth information, documents or authorizations as required" by the Illinois Administrative Code. The Agency continued that, "due to the deficiency" with petitioners' application, no "technical review of the application" was performed.

The petitioners appealed the Agency's denial of its application to the Board. Both the petitioners and Agency filed motions for summary judgment with the Board. The Board ultimately granted the Agency's motion for summary judgment. Petitioners appeal.

ANALYSIS

Petitioners make the following claims on appeal: (1) Special Condition No. 9 violates the commerce clause of the United States Constitution (U.S. Const., art. I, §8, cl. 3) and, therefore, is unconstitutional; (2) Special Condition No. 9 is unconstitutionally vague; (3) the Agency wrongfully denied petitioners' application since no violation of the Environmental Protection Act (the Act) (415 ILCS 5/1 *et seq.* (West 2002)) would have occurred if the application had been granted; and (4) the Agency's reply to petitioners' application was untimely in violation of the Agency's own regulations (35 Ill. Adm. Code §807.205(f) (1985)) and, therefore, the application should have been granted by operation of law. We address these issues in the order presented.

I. Denial of Petitioners' Application

Petitioners argue that the main issue on appeal is "whether the subject clause of the permit Special Condition No. 9, which restricts petitioners from accepting waste that is generated outside the 'Municipal Boundary' of the Village of Bradley, is invalid as unconstitutional, as a *per se* violation of the U.S. Commerce Clause." This might be true if the transfer station in question is otherwise in compliance with the Act and qualified as a regional pollution control facility. As we will discuss below, it is not. We find that the Agency acted properly and, therefore, affirm the order of the Board.

On March 27, 2003, petitioners filed a document with the Agency that petitioners titled, "Application for Modification to Operating Permit 1994-30[6]-OP." While petitioners chose to refer to their action as an "application for

modification," in reality, the petitioners were attempting to gain authority to transform their "local" pollution control facility into a "regional" pollution control facility. To fully understand the nature of petitioners' actions, we find it necessary to review the circumstances surrounding their original application and the statutory scheme under which it was granted.

A. Statutory Scheme Under Which Original Permit Issued

At the time petitioners applied for their permit, the Act required that every "regional pollution control facility" obtain siting approval prior to its operation. 415 ILCS 5/39, 39.2 (West 1992). The Act defined a regional pollution control facility as "any * * * waste transfer station, waste treatment facility or waste incinerator that accepts waste from or that serves an area that exceeds or extends over the boundaries of any local general purpose unit of government." 415 ILCS 5/3.32 (West 1992).

In 1994, at the time of petitioners' application, they had a choice: apply for a regional pollution control facility permit and obtain siting approval or apply for a permit to operate a local pollution control facility in which case siting approval was not required. They chose the latter.

B. Petitioners' Original Application

On June 17, 1994, the petitioners filed an "Application for Development Permit" with the Agency. The application noted that "Siting Certification Form" LPC-PAB was completed and enclosed. It further noted that siting approval was not "under litigation" at the time of filing.

The siting certification form attached to the application stated as follows:

> "Siting Approval. The Applicant operates a solid waste hauling company serving customers within the Village of Bradley. For this reason, the proposed facility qualifies as a non-regional facility. Sections 22.14 and 39.2 of the Act do not apply to non-regional facilities. Thus, siting approval reverts to the local zoning authority."

C. *Tennsv v. Gade*

Approximately 11 months prior to the date on which petitioners filed their application, the United States District Court for the Southern District of Illinois issued an unpublished order which declared the statutory scheme described in part IA of this opinion unconstitutional. *Tennsv, Inc. v. Gade*, No. 92 503 WLB, (S.D. Ill. July 8, 1993). The court found that the Act "establishes a statutory scheme which distinguishes between facilities located outside the geographic boundaries of a general purpose unit of government and those which are not so located." *Tennsv*, slip op. at 2-3. The court went on to note that there was "no valid factor to justify the discriminatory effect of th[illegible] statutory scheme" and that it therefore "violates the Commerce Clause." *Tennsv*, slip op. at 5.

In response to the *Tennsv* decision, the Illinois legislature amended the Act effective December 22, 1994. The amendments removed the distinction between regional and local pollution control facilities.

Under the Act as amended in 1994, and in its current form, all "pollution control facilities" are required to obtain siting approval. 415 ILCS 5/3.330, 39(c), 39.2 (West 2004).

D. Analysis

Petitioners argue that their current application, filed approximately 10 years after the *Tennsv* decision, was improperly denied due to the Agency and the Board's incorrect interpretation of constitutional law. We disagree and hold that petitioners' application was correctly denied as the Agency and Board recognized it for what it was, an attempt to operate a regional pollution control facility without first obtaining the necessary siting approval required by the Act.

Petitioners now denounce the limitations contained within Special Condition No. 9, which they requested and failed to object to for approximately 10 years. They do a superb job of cataloging numerous commerce clause cases describing the evils of economic protectionism. That being said, we do not find the circumstances surrounding the denial of petitioners' application to be the result of unconstitutional economic protectionism. We note that neither the current nor prior statutory scheme involves a *Philadelphia v. New Jersey* situation in which commerce is blatantly halted at the border. See *Philadelphia v. New Jersey*, 437 U.S. 617, 57 L. Ed. 2d 475, 98 S. Ct. 2531 (1978) (United States Supreme Court struck down a New Jersey statute that prohibited the importation of waste which originated or was collected outside the territorial limits of the State of New Jersey). Nor is this a case in which out-of-state waste is subject to increased fees or surcharges above and beyond those charged against similar waste generated inside the State of Illinois. See *Chemical Waste Management, Inc. v. Hunt*, 504 U.S. 334, 119 L. Ed. 2d 121, 112 S. Ct. 2009 (1992) (which invalidated an Alabama statute that imposed higher fees on hazardous waste disposed of in Alabama landfills which

originated outside Alabama than fees charged to similar waste that originated inside the state). See also *Oregon Waste Systems, Inc. v. Department of Environmental Quality of the State of Oregon*, 511 U.S. 93, 128 L. Ed. 2d 13, 114 S. Ct. 1345 (1994) (which held Oregon's statute imposing a surcharge on out-of-state waste disposal that was almost three times greater than the surcharge on in-state waste violated the dormant commerce clause).

This case involves a now defunct statutory scheme that subjected those who wanted to accept waste from outside a local unit of government to siting approval while subjecting those who wanted to accept waste from only a local entity to that local entity's zoning laws. None of the cases cited by petitioners gave the improperly restricted party such a choice. See *Northeast Sanitary Landfill, Inc. v. South Carolina Department of Health & Environmental Control*, 843 F. Supp. 100 (D.S.C. 1992); *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Department of Natural Resources*, 504 U.S. 353, 119 L. Ed. 2d 139, 112 S. Ct. 2019 (1992); *Philadelphia v. New Jersey*, 437 U.S. 617, 57 L. Ed. 2d 475, 98 S. Ct. 2531 (1978); *Associated Industries of Missouri v. Lohman*, 511 U.S. 641, 128 L. Ed. 2d 639, 114 S. Ct. 1815 (1994); *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 100 L. Ed. 2d 302, 108 S. Ct. 1803 (1988); *C&A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 128 L. Ed. 2d 399, 114 S. Ct. 1677 (1994).

Under both the prior and current statutory schemes, petitioners could have applied for a permit to construct and operate a facility with the capacity to accept waste from anywhere, be it waste that originated inside or outside a local geographic area. This court has previously stated, when analyzing the prior statutory scheme, that "it is the applicant who defines the intended service area, not

the local decision-making body." *Metropolitan Waste Systems, Inc. v. Pollution Control Board*, 201 Ill. App. 3d 51, 55, 558 N.E.2d 785, 787 (1990). The Board ultimately found that, considering the statutory scheme which allows an entity to choose its service area, "the slight burden the permit imposes on interstate commerce does not outweigh the benefits that the permittees and the Village of Bradley enjoyed when the facility was established." We agree.

Not every exercise of state power with some impact on interstate commerce is invalid. *Edgar v. Mite Corp.*, 457 U.S. 624, 640, 73 L. Ed. 2d 269, 282, 102 S. Ct. 2629, 2639 (1982). When a siting requirement applies evenhandedly, "and has only an incidental impact on interstate commerce, the relevant inquiry is whether or not it effects a legitimate public interest, and if so, whether any burden on interstate commerce is '*clearly excessive* in relation to the putative local benefits.'" (Emphasis in original.) *LaFarge Corp. v. Campbell*, 813 F. Supp. 501, 513 (N.D. Tex. 1993), quoting *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 25 L. Ed. 2d 174, 178, 90 S. Ct. 844, 847 (1970). Undoubtedly, the regulation of solid waste disposal for the protection of public health and safety is a legitimate governmental purpose. *L&H Sanitation, Inc. v. Lake City Sanitation, Inc.*, 769 F. 2d 517 (8th Cir. 1984).

The Board acts in its quasi-judicial capacity when reviewing an Agency's decision to grant or deny a permit. *Environmental Protection Agency v. Pollution Control Board*, 308 Ill. App. 3d 741, 721 N.E.2d 723 (1999). A court of review will uphold a quasi-judicial determination unless it is contrary to the manifest weight of the evidence. *Environmental Protection Agency v. Pollution Control Board*, 308 Ill. App. 3d at 748; *Community Landfill Co. v.*

Pollution Control Board, 331 Ill. App. 3d 1056, 772 N.E.2d 231 (2002).

Again, despite petitioners' arguments to the contrary, this is not a case of unconstitutional economic protectionism. This case involves a private entity that made a choice to forego the siting process more than 12 years ago when it had that option. That ceased to be an option days after petitioners received their operating permit. Knowing that every pollution control facility similar to the one petitioners seek to operate must acquire siting approval, petitioners now effectively request that they be grandfathered in to the new statutory scheme and allowed to ignore the siting process. The Agency and the Board correctly recognized that granting petitioners' request would violate the Act's siting requirement. 415 ILCS 5/39(c) (West 2004).

II. Unconstitutional Vagueness of Special Condition No. 9

Petitioners contend that Special Condition No. 9 is unconstitutionally vague and, therefore, violates their due process rights under the United States and State of Illinois Constitutions. Specifically, they claim that the condition fails to "provide fair warning of what conduct is prohibited."

Special Condition No. 9 provides that: "No waste generated outside the municipal boundaries of the Village of Bradley may be accepted at this facility." This could not be more clear.

Petitioners argue that the terms "generated" and "municipal boundaries" are subject to so many interpretations that the Agency can engage in "selective enforcement" depending on which interpretation it favors. The

Agency and Board counter that petitioners have had no trouble understanding or interpreting the condition for 10 years, which belies "any feigned confusion by United Disposal." The Board and Agency further argue that petitioners have waived this argument as they failed to timely bring it.

In reply to the Agency and Board's waiver argument, petitioners contend that the ability of the Agency "to argue waiver was waived by the Agency when it responded [to] the petitioners' vagueness argument in the summary judgment briefing before the Board." Turnabout is fair play.

The waiver rule, of course, is a limitation on the parties and not upon the jurisdiction of a reviewing court. *Freedom Oil Co. v. Pollution Control Board*, 275 Ill. App. 3d 508, 655 N.E.2d 1184 (1995). We will address petitioners' vagueness argument.

A regulation is unconstitutionally vague and violates due process if it leaves the community regulated unsure of what conduct is prohibited or fails to provide adequate guidelines to the administrative body charged with its enforcement. *Smith v. Goguen*, 415 U.S. 566, 39 L. Ed. 2d 605, 94 S. Ct. 1242 (1974). That is not the case in this situation. As the Board notes, petitioners had no problem deciphering the condition for 10 years. Petitioners seemed to clearly understand the terms when they applied for a permit that did not require siting approval. Neither the term "generated" nor the term "municipal boundaries" is so perplexing as to leave one wondering what is prohibited. We hold Special Condition No. 9 is not void for vagueness.

III. Denial of Application in Violation of the Act

Petitioners contend that "no violation of the Act" would have occurred if the Agency had granted their request and as such it was error to deny it. This contention piggybacks petitioners' original argument that the prior statutory scheme from which Special Condition No. 9 was created violated the commerce clause and, as such, any restriction imposed by the state under that scheme is void as it was based upon an unconstitutional state enactment. See *Papasan v. Allain*, 478 U.S. 265, 92 L. Ed. 2d 209, 106 S. Ct. 2932 (1986). Petitioners continue that given the *Tennsv* decision, any condition imposed under the parts of the Act declared unconstitutional by the *Tennsv* court are invalid. We disagree. As noted in part ID above, we do not find that Special Condition No. 9 was the result of unconstitutional economic protectionism. Clearly, granting petitioners' application notwithstanding petitioners' failure to acquire (or even seek) siting approval would violate the Act. See 415 ILCS 5/39(c) (West 2004).

IV. Untimely Reply to Application in Violation of Agency's Regulations

Petitioners' final contention is that their request should have been granted by operation of law since the Agency's response to their application was untimely. The applicable section of the Administrative Code provides that "if the Agency fails to notify the applicant within * * * 30 days after the receipt of an application for an operating permit [] that the application is incomplete, and of the reasons, the application shall be deemed to have been filed on the date received by the Agency." 35 Ill. Adm. Code §807.205(f) (1985).

The Board acknowledged that the Agency issued its response to petitioners' application 45 days after it was filed and the response was therefore untimely. Furthermore, the Board upheld the Agency's denial of "United Disposal's request as incomplete." An administrative agency cannot ignore it's [sic] own rules once they have been established pursuant to statutory authority. *Margolin v. Public Mutual Fire Insurance Co.*, 4 Ill. App. 3d 661, 281 N.E.2d 728 (1972); *Panhandle Eastern Pipe Line Co. v. Environmental Protection Agency*, 314 Ill. App. 3d 296, 734 N.E.2d 18 (2000). Having failed to inform petitioners that their application was incomplete and "of the reasons" why within the time prescribed by section 801.205(f), the Agency undoubtedly failed to comply with its own rules.

This does not mean, however, that the application should have automatically been granted by operation of law as petitioners suggest. While petitioners make this claim, they cite no authority to support it.

Given that section 40 of the Act states that "the decision of the Board shall be based exclusively on the record before the Agency including the record of the hearing, if any" (415 ILCS 5/40(d) (West 2004)), and the Agency's action of ignoring its own rule which resulted in its failure to conduct a technical review of petitioners' application, our initial inclination would be to remand this cause to the Agency to perform a technical review of the application as filed. That, however, is unnecessary.

There is no doubt that the Act has always required siting approval to develop and operate the type of pollution control facility sought by petitioners. See 415 ILCS 5/39(c), 39.2 (West 1992). There is also no doubt from the record that petitioners never obtained (or even sought) proper

siting approval. As such, the only action the Agency could have taken had it performed a technical review would have been to deny the application.

The Administrative Code states that "the Agency shall not grant any permit * * * unless the applicant submits adequate proof that the solid waste management site * * * will be developed, modified, or operated so as not to cause a violation of the Act or the Rules." 35 Ill. Adm. Code §807.207(a) as amended by 20 Ill. Reg. 12457 (eff. August 15, 1996). Following the Agency's denial of their application, on appeal to the Board the petitioners needed to "establish that [granting their application] would not result in any future violation of the Act." *Browning-Ferris Industries of Illinois, Inc. v. Pollution Control Board*, 179 Ill. App. 3d 598, 603, 534 N.E.2d 616, 620 (1989). This petitioners cannot do, as they have failed to acquire siting approval.

CONCLUSION

For the foregoing reasons, the decision of the Illinois Pollution Control Board is confirmed.

Confirmed.

HOLDRIDGE and McDADE, JJ., concur.

ILLINOIS POLLUTION CONTROL BOARD
June 17, 2004

UNITED DISPOSAL OF BRADLEY, INC., and MUNICIPAL TRUST & SAVINGS BANK as trustee under Trust 0799,	)	
Petitioners,	)	PCB 03-235 (Permit Appeal – Land)
v.	)	
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
Respondent.	)	

OPINION AND ORDER OF THE BOARD (by N.J. Melas):

Today the Board addresses the parties' cross motions for summary judgment. This matter involves whether a waste transfer station permitted in 1994 must obtain local siting approval before it can have a geographic limitation on its service area removed from its operating permit.

The Illinois Environmental Protection Agency (Agency) issued United Disposal of Bradley, Inc. (United Disposal) and Municipal Trust & Savings Bank, as Trustee Under Trust 0799 (Municipal Trust & Savings) (collectively, petitioners) a development permit for a waste transfer station in 1994. The development permit included a special condition that prohibits acceptance of: (a) waste generated outside the corporate limits of the Village of Bradley, Kankakee County; and (b) special waste. In 1995, the Agency issued an operating permit that included the same condition. At the time of issuance, the language limiting the facility's service area exempted United Disposal from

going through the local site location suitability approval process of Section 39.2 of the Environmental Protection Act (Act) necessary only for "regional pollution control facilities." Instead, the limited service area qualified United Disposal as a "non-regional pollution control facility." *See* 415 ILCS 5/39.2

The legislative distinction between "regional" and "non-regional" pollution control facilities has not existed since 1994. In 2003, United Disposal sought to have the language limiting its service area deleted from its operating permit by applying for a supplemental permit from the Agency. The Agency denied United Disposal's request as incomplete on the procedural grounds that United Disposal must request the same modification of its development permit. Additionally, the Agency stated that before it could make those modifications, United Disposal must provide proof of local siting approval from the Village of Bradley under Section 39.2 of the Act.

For the reasons set forth below, the Board grants the Agency's motion for summary judgment and denies the petitioners' motion. Accordingly, the Board affirms the Agency's denial of United Disposal's request to modify its operating permit for the waste transfer station located in the Village of Bradley, Kankakee County (facility).

PROCEDURAL BACKGROUND

On July 10, 2003, the Board accepted this matter for hearing. The Agency filed the administrative record on August 14, 2003.[1] The petitioners moved the Board for

[1] The Board cites to the administrative record as "AR. at _."

summary judgment on December 2, 2003, and the Agency responded on December 26, 2003.[2] The Agency filed a motion *instanter* for summary judgment in its favor on December 5, 2003, accompanied by a motion to supplement the record.[3] United Disposal responded to the Agency's motion for summary judgment on February 4, 2004, and the Agency replied on February 23, 2003.[4] No hearing has been held in this matter. The decision deadline is currently August 19, 2004.

The Board grants both parties' motions to file *instanter* and accepts the parties' motions for summary judgment.

MOTION TO SUPPLEMENT

It is well-settled that the Agency record in a permit appeal consists only of the information which the Agency considered or should have considered in making its permitting decision. *Alton Packaging Corp. v. PCB*, 162 Ill. App. 3d 731, 516 N.E.2d 275 (5th Dist. 1987); *Joliet Sand & Gravel v.* PCB, 163 Ill. App. 3d 830, 516 N.E.2d 955 (3rd Dist. 1987). The Board has denied motions to supplement the Agency record with information that the Agency did not or should not have considered. *CWM Chemical Services, Inc. v. IEPA*, PCB 89-177 (July 11, 1991). Here, the Agency considered the documents it now seeks to add to the record when the permitting decision was made.

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[2] The Board cites to the petitioners' motion for summary judgment as "Pet. Mot. at _," and the Agency's response as "Agency Resp. at _."

[3] The Board cites to the Agency's motion for summary judgment as "Agency Mot. at _."

[4] The Board cites to the petitioners' response as "Pet. Resp. at _," and the Agency's reply brief as "Agency Reply at _."

The four supplemental documents the Agency seeks to add are: (1) the second page of notes regarding the facility, page 126 of the administrative record, which was copied incorrectly in the record; (2) a letter from the Mayor of the Village of Bourbonnais to the Agency, dated April 3, 2003, supporting United Disposal's request to eliminate the restriction against accepting waste from outside the Village of Bradley (Bradley); (3) a letter from the Mayor of the City of Kankakee to the Agency, dated April 10, 2003, supporting United Disposal's request to eliminate the restriction against accepting waste from outside Bradley; and (4) a letter dated May 15, 2003, expressing the Agency's final decision to deny the petitioners' application for a permit to modify the operating permit.

The petitioners did not respond to the Agency's motion to supplement the record with the additional three documents. A party who fails to respond to a motion is deemed to have waived any objection to the Board granting the motion. 35 Ill. Adm. Code 101.500(d).

The Board notes that the fourth document the Agency seeks to supplement is already contained in the administrative record as pages 98 and 99. The first, second, and third documents are not found within the originally-filed record. The documents predate the Agency's final denial letter of May 15, 2003, and were available to the Agency when making its permit decision, the Board grants the Agency's motion to supplement the administrative record with the first three documents and incorporates those three documents into the record. The Board denies the Agency's motion to supplement the record with the fourth document as moot, finding it already exists in the record.

PRELIMINARY MATTER

On June 7, 2004, United Disposal filed a motion to strike a public comment submitted by John J. Bevis on May 24, 2004 (PC16). Although the 14-day response period has not yet run, the Board addresses United Disposal's motion today to avoid undue delay in this proceeding. *See* 35 Ill. Adm. Code 101.500(d).

United Disposal claims the Board should strike Mr. Bevis' public comment because it contains evidence not contained in the record. United Disposal argues that the Board's decision is limited to the record on appeal. Mot. to Strike at 2; citing 415 ILCS 5/40(c) (2002). In support of its argument, United Disposal references the Board's order of August 21, 2003, in which the Board accepts all of a public comment submitted by Ms. Wheeler, except a letter not contained in the record on appeal.

The Board finds PC16 properly filed under Section 101.628(c) of the Board's procedural rules. Mr. Bevis provides his opinion and recommendation in the comment and does not submit for Board review any documents not included in the public record. Accordingly, the Board denies United Disposal's motion to strike PC 16.

FACTS

On September 21, 1994, the Agency granted the petitioners a permit to develop a municipal solid waste transfer station (No. 1994-306-DE). AR. at 1-7. The facility consists of 4.7 acres and is located in the Village of Bradley in Kankakee County. AR. at 1. The development permit specifically stated the facility was a non-regional pollution control facility. The Agency issued the permit subject to

certain special conditions. Special condition #9, relating to operation of the facility, stated:

> No waste generated outside the municipal boundaries of the Village of Bradley may be accepted at this facility. Furthermore, no waste, meeting the definition of "special waste" given in Section 3.45 of the Act (including "hazardous waste" as defined in Section 3.15 of the Act), may be accepted at this facility. AR. at 3.

The permit identified Mr. Merlin Karlock of Muncipal [sic] Trust and Savings Bank as the owner, and Mr. Michael Watson of United Disposal of Bradley, Inc. as the operator of the facility. *Id.* The permit approved development, not operation of the facility. AR. at 1.

On January 19, 1995, the Agency issued the petitioners an operating permit for the facility (No. 1994-30-OP). AR. at 67-73. The operating permit also contained the language of special condition #9. AR. at 69.

United Disposal applied to the Agency for a modification of its operating permit on March 27, 2003. AR. at 129. The application sought only to delete the geographical limitation of special condition #9 of the operating permit. United Disposal does not seek to modify the prohibition against accepting special waste at the facility. *Id.* On May 15, 2003, the Agency denied United Disposal's request for modification of its operating permit as incomplete pursuant to Section 807.205(f) of the Board's rules. AR. at 143. The Agency's denial letter reasoned that applying for a supplemental permit to revise the operating permit is not the proper way to remove special condition #9. The Agency's letter stated there must be a corresponding change made to the development permit. Further, the

Agency's letter states the nature of the request requires local siting approval as provided by Section 39.2 of the Act. AR. at 144.

The Board has received sixteen public comments regarding this matter, all in support of United Disposal's position. The public comments include letters from the mayor of the City of Kankakee, Mr. Donald Green, the Village of Bradley President, Mr. Jerry Balthazor, the Kankakee County Economic Development Council, State Representative Lisa Dugan, and Mr. John Bevis of the Kankakee County Health Department. The public comments also include letters from neighbors, former residents, and small business owners located in the vicinity of United Disposal including: C.W. Hawley, Joseph Deno, Mr. & Mrs. Goldman, Linden White, Shawn Seabough, Denny Miller, Allen Green, Don Barber, Diane Neal, and Don Watson.

RELEVANT STATUTORY BACKGROUND

Section 3.330(b) of the Environmental Protection Act (Act) defines a new pollution control facility as:

> (1) a pollution control facility initially permitted for development or construction after July 1, 1981; or
>
> (2) the area of expansion beyond the boundary of a currently permitted pollution control facility[.] 415 ILCS 5/3.330(b)(1), (2) (2002).

* * *

When United Disposal applied for and received its development permit, the Act excluded the following from the definition of a regional pollution control facility:

> [S]ites or facilities located within the boundary of a local general purpose unit of government and intended to serve only that entity[.] 415 ILCS 5/3.32(a) (1992).

Section 22.14(a) of the Act effective when the Agency issued United Disposal's development permit established setback requirements for waste transfer facilities located in the proximity of residentially zoned property and applicable only to regional facilities. 415 ILCS 5/22.14(a) (1992). Also at that time, Section 39.2 of the Act required the local siting authority to consider certain criteria when deciding whether to approve or disapprove siting for regional pollution control facilities. 415 ILCS 5/39.2 (1992).

Section 39(c) of the Act provides:

> [N]o permit for the development or construction of a new pollution control facility may be granted by the Agency unless the applicant submits proof to the Agency that the location of the facility has been approved by the County Board of the county if in an unincorporated area, or the governing body of the municipality when in an incorporated area, in which the facility is to be located in accordance with Section 39.2 of this Act. 415 ILCS 5/39(c) (2002).

Section 807.205(f) of the Board's solid waste and special waste hauling rules states:

> An application for permit shall not be deemed filed until the Agency has received, at the designated address, all information, documents, and authorization in the form and with the contend [sic] required by these rules and related Agency procedures. However, if the Agency fails to notify

> the applicant within 45 days after the receipt of an application for development permit and 30 days after the receipt of an application for an operating permit, that the application is incomplete, and of the reasons, the application shall be deemed to have been filed on the date received by the Agency. An applicant may deem the Agency's notification that the application is incomplete as a denial of the permit for purposes of review pursuant to Section 40 of the Act. 35 Ill. Adm. Code 807.205(f).

Section 807.207 of the Board's rules governing solid waste and special waste hauling provides:

> The Agency shall not grant any permit, except an Experimental Permit under Section 807.203 unless the applicant submits adequate proof that the solid waste management site:
>
> a) will be developed, modified, or operated so as not to cause a violation of the Act or the Rules, or has been granted a variance pursuant to Title IX of the Act (Ill. Rev. Stat. 1981, ch. 111 ½, pars. 1035-1038); and
>
> * * *
>
> c) in the case of operating permits only, conforms to all conditions contained in the development permit.

SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate when the pleadings, depositions, admissions on file, and affidavits disclose that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Dowd & Dowd, Ltd. v. Gleason*, 181 Ill. 2d 460, 483,

693 N.E.2d 358, 370 (1998). In ruling on a motion for summary judgment, the Board "must consider the pleadings, depositions, and affidavits strictly against the movant and in favor of the opposing party." *Id.* Summary judgment "is a drastic means of disposing of litigation," and therefore it should be granted only when the movant's right to the relief "is clear and free from doubt." *Id.*, citing *Purtill v. Hess*, 111 Ill. 2d 299, 240, 489 N.E.2d 867, 871 (1986). However, a party opposing a motion for summary judgment may not rest on its pleadings, but must "present a factual basis which would arguably entitle [it] to a judgment." *Gauthier v. Westfall*, 266 Ill. App. 3d 213, 219, 639 N.E.2d 994, 999 (2d Dist. 1994).

Both the petitioners and the Agency have asked the Board to grant summary judgment in their favor. Upon reviewing the pleadings and the record in this matter, the Board agrees that there are no issues of material fact and that it may grant summary judgment as a matter of law. In determining whether to grant summary judgment, the Board must look to the burden of proof in a permit appeal and the arguments presented by the parties. The Agency's denial letter frames the issues on appeal. *Pulitzer Community Newspapers, Inc. v. IEPA*, PCB 90-142, slip op. at 6 (Dec. 20, 1990).

BURDEN OF PROOF IN PERMIT APPEALS

Section 105.112(a) of the Board's procedural rules provides the petitioner has the burden of proof on appeal of permits under Section 40 of the Act. Here, the petitioners must demonstrate that approval of the permit application would not cause a violation of the Act or underlying regulations. "On appeal 'the sole question before the Board

is whether the applicant proves that the application, as submitted to the Agency, demonstrated that no violation of the Act would occur of the permit was granted.'" *Saline County Landfill, Inc. v. IEPA*, PCB 02-108 (May 16, 2002); citing *Panhandle Eastern Pipe Line Co. v. IEPA*, PCB 98-102, slip op. at 10 (Jan. 21, 1999).

DISCUSSION

In the following pages, the Board will first discuss the petitioners' motion for summary judgment and then the Agency's response. Next, the Board will discuss the Agency's motion and the petitioners' response. Finally, the Board will analyze the parties' arguments and give reasons for its findings of fact and conclusions of law.

Petitioners' Motion for Summary Judgment

United Disposal and Municipal Trust & Savings argue they are entitled to summary judgment as a matter of law for various reasons. First, petitioners argue that the Act no longer distinguishes between regional and non-regional waste transfer facilities, as the distinction was found unconstitutional and the relevant statutes amended accordingly. Pet. Mot. at 2. The petitioners claim that likewise, the Agency should allow the petitioners' requested amendment to United Disposal's operating permit and delete the unconstitutional geographical limitation.

Second, petitioners maintain that United Disposal's application was not incomplete. According to the petitioners, Section 39.2 siting approval is not necessary for the modification of an operating permit. *Id.* The petitioners argue that nothing requires a simultaneous and identical

change to the facility's development permit. Further, the petitioners contend that the requested modification does not amount to any change or expansion that would necessitate a simultaneous change to the development permit.

Finally, the petitioners claim that the Agency did not meet the 30-day deadline set forth in Section 807.205(f) for determining that the request for a permit modification was incomplete. Failure to meet the deadline, petitioners argue, means the application is deemed complete and granted as a matter of law. Pet. Mot. at 3.

Contested Language of Condition #9 Must be Struck as Vague and Unconstitutional

First the petitioners argue that the Agency's denial was incorrect because the application sought to strike an unconstitutional condition from its operating permit, for which the Agency no longer has statutory authority. Pet. Mot. at 8. The petitioners contend that the statutes in effect when the Agency included special condition #9 in the petitioners' operating permit were found unconstitutional in *Tennsv, Inc. v. Gade*, 1993 U.S. Dist. Lexis 10403 (S.D. Ill. 1993). *Id.* The court in *Tennsv, Inc.* held that a state statute that clearly discriminates against interstate commerce is unconstitutional unless it can be shown that the discrimination is justified by a valid factor not related to economic protectionism. *Id.* at 9; citing *Gratiot Landfill v. Michigan Dept. of Nat. Res.*, 119 L.Ed. 2d 139, 112 S.Ct. 2019, 2023 (1992).

The petitioners continue that the statutes found to discriminate against interstate commerce, Sections 39.2, 3.32, and 22.14(a) of the Act, were then amended by the Illinois legislature to delete the unconstitutional language.

The petitioners argue that, as a result, any permit condition that was imposed under the authority of those statutes should also be found null and void. Pet. Mot. at 8-9.

Alternatively, the petitioners contend that even assuming the Board does not deem the contested language of condition #9 invalid by reason of its unconstitutional authorizing statute, the condition nonetheless fails. The petitioners contend that the language of condition # 9 is a vague and unconstitutional restriction of commerce independent of the authorizing statutes. The petitioners opine that the terms "generated" and "municipal boundaries" are not defined in the permit and render condition #9 impermissibly vague. Pet. Mot. at 13; citing *Smith v. Goguen*, 415 U.S. 566, 575-76, 94 S.Ct. 1242 (1971).

Finally, petitioners argue that by denying United Disposal's request for modification of its operating permit, the Agency effectively re-imposed the geographic limitation in condition #9, when it no longer had the authority to do so. Pet. Mot. at 14.

No Pollution Control Facility Siting Approval is Necessary

Next the petitioners argue that the request for modification of the facility's operating permit does not require Section 39.2 siting approval. Pet. Mot. at 15. The petitioners argue the facility is not new and the permit modification does not seek a change in size or capacity, but only a change in the operational limits. The petitioners argue that this change does not trigger a need for Section 39.2 siting approval. Pet. Mot. at 15-16.

Modification of Petitioner's Development Permit is Not Necessary

Finally, the petitioners contend that the Agency's denial requiring the same modification to the facility's development permit was incorrect. Pet. Mot. at 16. The petitioners argue that the geographical limitation on the service area has no bearing on the physical design, construction or boundaries of the facility. Therefore, the petitioners reason, no change to the development permit is necessary.

Petitioners continue that in the alternative, if the Board determines that the contested language in condition #9 must also be removed from the development permit, petitioners can still apply for that modification. *Id.* at 17.

The Agency Did Not Meet the 30-Day Deadline

The petitioners argue that Section 807.205(f) of the Board's rules requires the Agency to notify an applicant that an application for an operating permit is incomplete within 30 days of receiving the application. Pet. Mot. at 18. The petitioners contend that if the Agency fails to notify the applicant that the operating permit application is incomplete, the application is deemed filed on the date it is received by the Agency. 35 Ill. Adm. Code 807.205(f). The petitioners contend the Agency's March 15, 2003 letter indicates that the denial was based on incompleteness, not the substance of the application itself. The petitioners continue that because the denial was not sent until 45 days after the Agency received the application for an operating permit, the application should have been deemed complete as a matter of law. *Id.*

Relief Requested

In summary, the petitioners request that the Board either: (1) reverse the Agency's denial of the petitioners' application to modify its operating permit finding that condition #9 is unconstitutional as a matter of law; (2) find that the petitioner's [sic] application does not mandate an identical change to the facility's development permit or require Section 39.2 siting approval; or (3) find the petitioner's application complete as a matter of law because the Agency did not issue the incompleteness determination until more than 30 days after it received the application. The petitioners also seek other and further relief as the Board deems appropriate. Pet. Mot. at 19.

Agency's Response

The Agency moves the Board to deny the petitioners' motion for summary judgment and affirm the Agency's March 15, 2003 final decision. The Agency argues that it did not, as the petitioners contend, base its final decision on the outdated distinction between non-regional and regional pollution control facilities. The Agency further argues that the petitioners' arguments that its application does not require proof of local siting approval and a similar modification to the facility's development permit are without merit. The Agency explains that the petitioners' arguments do not consider the nature of the permit application or the other permits already issued to the facility. Finally, the Agency contends that it acted within all of the applicable deadlines set forth by the Board regulations.

The Agency Correctly Applied the Law

First, the Agency contends that the petitioners misapply the *Tennsv, Inc.* case to the facts at hand. The Agency explains that the court in *Tennsv, Inc.* held that certain provisions of the Act discriminated against operations handling out-of-state municipal solid waste, not locally generated municipal solid waste, in violation of the Commerce Clause of the Constitution of the United States. Agency Resp. at 3; *Tennsv, Inc. v. Gade*, 1993 U.S. Dist. Lexis 10403 (S.D. Ill. 1993) (July 8, 1993). The Agency states that the petitioners erroneously interpreted the *Tennsv, Inc.* case to prevent United Disposal from accepting waste generated outside the municipal boundaries of the Village of Bradley. The Agency contends that the contested language in condition #9 is not unconstitutional, and that *Tennsv, Inc.* does not support the petitioners' argument that it is. The Agency argues that *Tennsv, Inc.* held, rather, that legislation that treats facilities differently, by requiring proof of local siting approval from some and not others based on the facilities' service area is unconstitutional. Agency Resp. at 6.

Second, the Agency contends that during the original application process, the applicants specifically asked that specific language be included in the development permit to limit the facility's service area. The Agency argues that it was the permit applicants, not the Agency, that restricted the type of waste the transfer station could accept based on the point of generation. The Agency further argues that United Disposal did not appeal the operating permit, which included condition #9, when it was issued in 1995, two years after the *Tennsv, Inc.* decision. Agency Resp. at 4.

The Agency states that by requesting the restriction in condition #9, the petitioners benefited by avoiding the local siting approval process and not having to comply with setback requirements. Agency Resp. at 4. Further, the Agency states it is a general rule that a permit condition not appealed when imposed, may not be appealed in a subsequent permit. *Id.* at 5; citing *Mick's Garage v. IEPA*, PCB 03-126 (Dec. 8, 2003). Therefore, because the petitioners did not appeal the restriction on service area as unconstitutional when the Agency issued the permit in 1995, the petitioners cannot now appeal the condition. *Id.*

The Agency also argues that the contested language of condition #9 is not null and void because Sections 39.2, 3.32, and 22.14(a) of the Act were found unconstitutional and amended. Agency Resp. at 6. The Agency states that if, as the petitioners' [sic] argue, the Agency had no authority to issue development or operating permits to United Disposal, then United Disposal would have no valid Agency-issued permits. It would follow, then, that the Agency should treat the permit United Disposal now seeks as an initial permit for development requiring proof of local siting approval. *Id.* at 7.

The Agency reiterates that there is nothing unconstitutional about limiting a facility's service area. It is only the facility's use of a limited service area to avoid obtaining local siting approval that was found unconstitutional in *Tennsv, Inc.* Agency Resp. at 7.

The Agency next argues that the contested language in condition #9 is vague. The Agency argues the permit was issued in 1994 and United Disposal had no problem with the language until it filed this action in 2003. Agency Resp. at 7-8. The Agency contends the language in condition #9 is

based either on statutory definitions, or commonly understood in layman's terms.

Lastly, the Agency responds that it did not re-impose an unconstitutional provision, the contested language of condition # 9, by denying United Disposal's application. Agency Resp. at 8. The Agency restates that the contested language is not unconstitutional. Regardless, the Agency states that United Disposal itself proposed the service area limitation in its original application for a development permit. *Id.*

The Petitioner's Permit Application Sought to Modify the Development Permit

The Agency argues it would be "nonsensical" to allow a permittee to modify a condition in an operating permit, but not a development permit. Agency Resp. at 10. The Agency argues that if an operating permit has imposed a condition that also exists in the development permit, it follows that both the development and operating permits must reflect any permit condition modification. *Id.*

The Agency also contends that the geographical limit that the petitioners seek to remove does constitute an expansion under the definition of a new pollution control facility. Agency Resp. at 11. The Agency states that the Board has recognized that the legislature purposefully drafted Section 3.32(b) of the Act (415 ILCS 5/3.32(b)) (now, 415 ILCS 5/3.330(b) (2002)) broadly so that it would apply to all expansions of regional pollution control facilities. Agency Resp. at 11; citing *Bi-Disposal Inc., v. IEPA*, PCB 89-49, slip op. at 5 (June 8, 1989). The Agency continues that the appellate court affirmed the Board's decision, holding that an increase in the capacity of a

landfill to accept and dispose of waste, while not specifically defined in the Act, would impact the criteria that local siting authorities consider in assessing the propriety of establishing a new regional pollution control facility. Agency Resp. at 11; citing *Bi-State Disposal, Inc. v. PCB*, 203 Ill. App. 3d 1023, 1027, 561 N.E.2d 423, 426 (5th Dist. 1990). The Agency concludes that because the nature of United Disposal's requested modification meets the definition of Section 3.330(b) of the Act, the Agency is correct in requiring that United Disposal undergo local siting approval. Agency Resp. at 12.

The Agency Complied with the Time Periods for Review

The Agency states it properly treated United Disposal's application as one seeking a modification of its development permit. The Agency argues that Section 807.205(f) of the Board's regulations, the Agency has 45 days after receipt of a development permit application to issue a decision. 35 Ill. Adm. Code 807.205(f). The Agency states it received the application on March 31, 2003 (AR. at 129), and issued a final decision on that application on May 15, 2003 (AR. at 143). The Agency argues that, accordingly, its final decision was timely. Agency Resp. at 12.

Agency's Motion for Summary Judgment

The Agency states the issue is whether United Disposal's application for modification of its operational permit would violate the Act if approved. Agency Mot. at 5. The Agency contends that the permit application, if approved, would violate Section 39(c) of the Act. The Agency states that the Act requires proof that the local

siting authority has approved the location of any new pollution control facility in accordance with Section 39.2 before the Agency can grant any permit for the development or construction of the facility. Agency Mot. at 6. The Agency maintains that because the application seeks a change that would result in a new pollution control facility, proof of local siting approval is necessary before the Agency can issue a permit.

Change in the Act

As a preliminary matter, the Agency outlines how the Act has changed in the wake of the *Tennsv, Inc.* decision. The Agency states that at the time United Disposal applied for a development permit, the Act distinguished between regional and non-regional pollution control facilities. Agency Mot. at 4. The distinction was significant because regional pollution control facilities required Section 39.2 siting approval, while non-regional facilities did not. The Agency continues that in July 1993, a federal district court in Illinois ruled that using the word "regional" to distinguish between facilities that have limited or unlimited service areas was unconstitutional. In response to the ruling, the Illinois General Assembly amended the relevant sections of the Act to remove the term "regional" and the exemption found in Section 3.32(a)(1) of the Act by legislation effective December 22, 1994. Agency Mot. at 5.

United Disposal's Facility is a Pollution Control Facility

The Agency argues that United Disposal's transfer station meets the definition of a pollution control facility

as it is defined in Section 3.330(a) of the Act. Section 3.330(a) states: "'Pollution control facility' is any waste storage site, sanitary landfill, waste disposal site, waste transfer station, waste treatment facility, or waste incinerator." 415 ILCS 5/3.330(a) (2002).

The Agency further contends that United Disposal's Agency-issued permits to develop and operate the facility as a transfer station also identify the facility as a transfer station that accepts waste. Agency Mot. at 6; citing AR. at 1-7, 67-73. It follows, the Agency argues, that any modification or change in the facility's development or expansion may cause the facility to be considered a new pollution control facility.

The Agency contends that it issued United Disposal an operating permit on January 19, 1995, after the Act was amended to delete the word "regional" from the term "regional pollution control facility." The Agency states the permit did not refer to the facility as non-regional, but included condition #9 limiting the service area because it was already part of United Disposal's development permit. The Agency notes that the petitioners did not appeal any conditions imposed in either the development or operating permit until this action was filed in 2003. Agency Mot. at 7.

United Disposal's Permit Application Was for a New Pollution Control Facility

The Agency states that Section 39(c) requires Section 39.2 local siting approval only before the Agency can issue development permits, not operating permits. Agency Mot. at 8; citing 415 ILCS 5/39(c) (2002). Therefore, the Agency argues, by requesting a modification of only its operating permit, United Disposal is attempting to expand its

service area without having to undergo local siting approval.

The Agency states that Section 3.330(b)(1) of the Act defines a new pollution control facility as "a pollution control facility initially permitted for development or construction after July 1, 1981." Agency Mot. at 8; citing 415 ILCS 5/3.330(b)(1) (2002). The Agency contends that subsection (b)(1) applies when an applicant files an *initial* application for permitting a pollution control facility, as opposed to a request for modification of an already permitted site, after July 1, 1981. Agency Mot. at 10; citing *Waste Management of Illinois, Inc. v. IEPA*, PCB 94-153 (July 21, 1994). The Agency states that when Section 3.330 was enacted (then, Section 3.32(b)), subsections (b)(2) and (b)(3) defined when "grandfathered" facilities, or facilities permitted before July 1, 1981, had to provide proof of local siting approval as when the facility: (1) expanded its boundaries; or (2) requested to accept special or hazardous waste for the first time. Agency Mot. at 11; 415 ILCS 5/3.32 (199?[sic]). The Agency contends that United Disposal is a pollution control facility requesting an expansion, and therefore, a new facility. Accordingly, the Agency argues that Section 3.330(b) requires United Disposal must submit proof of Section 39.2 local siting approval. Agency Mot. at 12.

United Disposal's Transfer Station is Not Grandfathered Out of Local Siting Approval Requirements

The Agency contends that in the wake of the *Tennsv, Inc.* decision, the General Assembly amended Sections 3.32, 22.14(a), and 39.2 of the Act to striking all distinctions between regional and non-regional pollution control

facilities. The Agency contends that the General Assembly did not intend to "grandfather" currently permitted facilities out of the requirement of having to obtain local siting approval. Agency Mot. at 12.

In support of this principal, the Agency cites to the 88th General Assembly's debate of the bill that amended Sections 3.32, 22.14, and 39.2 of the Act (House Bill 1594 that became public act 88-681). The Agency contends that the Senate sponsor of the bill stated that even though the proposed legislation removed the word "regional" from pollution control facility siting legislation, "A city or a county or any local government can still have a local facility that takes in only their waste, but under the new language now, it will have to go through the siting process, just as a multi-unit government facility has to." Agency Mot. at 13-14; citing Senator Doris Karpiel, December 1, 1994 Senate floor debate.

The Agency contends that at the time the Agency issued United Disposal its development permit, the Act defined "regional pollution control facility" in Section 3.32(a) of the Act. The Agency further contends that the General Assembly did not intend for facilities to be "grandfathered" into local siting. Thus, the Agency argues the Board should not find that United Disposal's transfer station is a "currently permitted" facility under Section 3.32(b)(2) or (b)(3). Agency Mot. at 15.

United Disposal's Facility May Be Subject to Section 3.330(b)(2) of the Act

The Agency argues that even assuming the Board concludes that the facility does qualify as a newly developed facility under Section 3.330(b)(1), United Disposal

must still show proof of local siting approval because the modification qualifies as an expansion under Section 3.330(b)(2) of the Act. 415 ILCS 5/3.330(b)(2) (2002). The Agency contends that expansion beyond the boundaries of a currently permitted facility triggers local siting approval under Section 3.330(b)(2) of the Act. Agency Mot. at 15.

The Agency argues that eliminating the service area limitation will result in increasing United Disposal's capacity to accept and transfer waste. The increased capacity results in a facility substantially different than what was originally proposed when the Agency permitted the facility. Agency Mot. at 16; citing *Saline County Landfill, Inc. v. IEPA*, PCB 02-108, slip op. at 13 (May 16, 2002). This, the Agency argues, constitutes an expansion requiring local siting approval under Section 3.330(b)(2) of the Act. *Id.*

Agency Conclusion

The Agency argues it is impossible to remove the contested language from United Disposal's operating permit without also removing the same language from its development permit. The Agency contends that amending the development permit makes United Disposal a new pollution control facility under Section 3.330(b)(1) of the Act. Agency Mot. at 17. New pollution control facilities require proof of Section 39.2 local siting approval. In the alternative, the Agency argues that even if the facility is not new, removing the geographic limitation on the facility's service area will cause a change in the facility's operations significant enough to constitute an expansion triggering local siting review under Section 3.330(b)(2) of the Act. *Id.*

Petitioners' Response

In response, the petitioners contend that removing the contested language from United Disposal's operating permit would not violate the Act. Next, the petitioners argue that United Disposal's request to modify its operating permit does not also require modification of its development permit. Finally, the petitioners claim that the Agency's argument that removing the geographical limitation constitutes an expansion of the transfer station fails because it is inconsistent with past Agency action. Pet. Resp. at 3.

The petitioners' [sic] argue that because *Tennsv, Inc.* found the law on which the geographical restriction in condition #9 was based unconstitutional, the condition itself is also unconstitutional. As a result, the petitioners argue that the Agency should have removed the condition as null and void, or alternatively, granted United Disposal's application and removed the condition. Pet. Resp. at 7-8.

The petitioners argue that Section 3.330(b)(1) does not apply. Pet. Resp. at 9. Contrary to the Agency's argument, the petitioners argue that United Disposal's application for a permit modification is not an *initial* permit, nor is it a *development* permit. Pet. Resp. at 10. According to the petitioners, under Section 3.330(a)(1), a waste transfer station is new if it was initially permitted for development after July 1, 1981. The petitioners argue that the facility does not fit that definition because when Section 3.330(a)(1) became effective, the facility already had an operating permit. Pet. Resp. at 12.

The petitioners argue that the permit application does not seek to change the type of waste the facility transfers

and that United Disposal is not seeking to be "grandfathered" into any statute. The petitioners contend that the part of the Agency's argument relating to legislative intent is irrelevant to the language of Sections 39(c) and 3.330(b)(1) of the Act, because the debate to which the Agency refers actually concerns a different paragraph of Section 39(c). Pet. Resp. at 12-13. The petitioners contend the Agency's "grandfathering" argument concerns solid waste disposal facilities only, and United Disposal's facility does not dispose of solid waste. Pet. Resp. at 13.

The petitioners further argue that Section 3.330(b)(2) does not apply to require siting approval for two reasons. First, United Disposal is not requesting a modification of the operational permit, and second, the facility is not expanding beyond the boundaries of its currently permitted facility. Pet. Resp. at 14. The petitioners argue that the Board and courts have found that Section 3.330(b)(2) applies when the expansion is both an increase in waste capacity and an increase in permitted physical dimensions. Mot. at 14; citing *Concerned Neighbors for a Better Environment, et al. v. County of Rock Island, et al.*, PCB 85-124 (Jan. 9, 1986). The petitioners contend the record contains no evidence that the application seeks an increase in capacity or physical dimensions of the facility. Pet. Resp. at 15. According to the petitioners, the requested modification will only affect the facility's operations.

The petitioner's argue that the Agency's reliance on *Waste Management* and *Saline County* is incorrect. Pet. Resp. at 15. The petitioners contends that distinguishable from Waste Management, there is no evidence in the record concerning capacity of United Disposal's facility and United Disposal does not propose to change any physical

change in the permitted structure. The petitioners argue that unlike in *Saline County*, United Disposal does not seek any physical change to the facility. Pet. Resp. at 16.

The petitioners contend that the Agency's March 7, 2002 approval of a transfer station's application to modify permits proves their point. A transfer station located in West Chicago applied to the Agency to modify a development and operating permit to increase the facility's capacity from 1,950 tons per day to 3,000 tons per day. Pet. Resp. at 17; Pet. Resp. Exh. A. The petitioners contend the Agency approved the transfer station's application without finding the modification was an expansion or requiring local siting approval under Section 3.330(b)(2). Pet. Resp. at 17.

Finally, the petitioners contend that applying either Section 3.330(b)(1) or 3.330(b)(2) is an improper retroactive application of the law. Pet. Resp. at 17. According to the petitioners, the Agency applies the law retroactively by arguing that United Disposal has no pollution control facility permits, or alternatively, that United Disposal must prove local siting approval if it wishes to remove a condition of its permit. Pet. Resp. at 18.

In summary, the petitioners argue that the portion of condition #9 at issue should be removed either because it is null, void, and unenforceable as a matter of law, or alternatively, because it is unconstitutional. For these reasons, the petitioners contend the Board should deny the Agency's motion for summary judgment and grant judgment in favor of United Disposal and Municipal Trust & Savings. Pet. Resp. at 18-19.

BOARD ANALYSIS

In light of the cross motions for summary judgment on the Agency's denial letter, the Board will address the two motions together. As previously explained, when considering motions for summary judgment, the Board must consider the facts of each motion in the light most favorable to the non-movant. *Dowd*, 693 N.E.2d at 370.

As set forth below, after analyzing the remaining issues set forth by the parties, the Board grants the Agency's motion for summary judgment and affirms the Agency's denial of United Disposal's application to modify its operating permit. The Board finds that United Disposal's application lacked necessary proof of local siting approval. The Board denies United Disposal's motion for summary judgment finding that before the Agency can grant the requested modification to the facility's operating permit, United Disposal must request a corresponding change to its development permit. Lastly, the Board finds that proof of local siting approval is a condition precedent to the Agency granting a modification to the facility's development permit.

Constitutionality of the Contested Language in Permit Condition #9

In its motion for summary judgment, United Disposal argues that because the laws that authorized the distinction between regional and non-regional facilities were found unconstitutional and removed from the Act, the Agency should find the contested language in United Disposal's permit unconstitutional and delete that language accordingly. First, the Board discusses whether the

Board can consider the constitutional issues that United Disposal raises.

It is a general principle that administrative agencies have the authority to determine constitutional applicability, but not the power to determine the constitutionality of legislation. *People v. Santa Fe Park Enterprises, Inc.*, PCB 76-84, slip op. at 8-9 (Sept. 23, 1983). The Board has found that the Board is necessarily empowered to consider constitutional issues, and that, where appropriate, the Board should address such issues in the interest of efficient adjudication of the entire controversy at hand. *Id.* at 9. But, the appellate courts have not squarely addressed this issue in their review of Board cases making this finding. *See People v. PCB*, 83 Ill. App. 3d 802, 404 N.E.2d 352 (1st Dist. 1980); *People v. PCB*, 129 Ill. App. 3d 958; 473 N.E.2d 452 (1st Dist. 1984).

First, the petitioners contend that *Tennsv, Inc. v. Gade*, supports their argument that the contested language in condition #9 of the operating permit is unconstitutional. Agency Resp. at 2-3; citing *Tennsv, Inc. v. Gade*, 1993 U.S. Dist. Lexis 10403, slip op. at 4, 5. The Agency argues that United Disposal's claim of unconstitutionality is untimely because it did not appeal the condition when the Agency issued the permit in 1994. Agency Resp. at 4-5. The Board finds that review of an administrative act on constitutional grounds is not time-barred. *Northwest Sanitary Landfill, Inc. v. South Carolina Dept. of Health and Envtl. Control, et al.*, 843 F. Supp 100, 104 (D. S.C. 1992).

The Board is not persuaded by United Disposal's argument that the contested permit language itself is unconstitutional. Pet. Mot. at 2. The Commerce Clause prohibits States (or their political subdivisions) from

advancing their own commercial interests by burdening the movement of commerce into or out of the state. *Tennsv, Inc.*, 1993 U.S. Dist. Lexis 10403, slip op. at 4, 5; citing *Fort Gratiot Landfill v. Michigan Dept. of Nat. Res.*, 119 L. Ed. 2d 139, 112 S. Ct. 2019, 2023 (1992). A state statute that clearly discriminates against interstate commerce is unconstitutional unless the discrimination can be justified by legitimate local concerns unrelated to economic protectionism. *Id.* at 2024.

The Board finds the contested language in condition #9 acts within the restraints of the Commerce Clause. Waste is an article of commerce,[6] and the Agency's approval of United Disposal's permit that affects interstate commerce, is an administrative act. However, the geographical limitation on the facility's service area is neutral; it applies only to United Disposal and allows the facility, at its own discretion, to accept waste only from within the municipal boundaries of the Village of Bradley. Thus, even though United Disposal admits that it accepts waste from one source in Indiana, the Board finds that United Disposal's permit has only incidental effects on interstate commerce. The slight burden the permit imposes on interstate commerce does not outweigh the benefits the permittees and the Village of Bradley enjoyed when the facility was established; avoiding the time and expense of the local siting process.

Although the Act no longer distinguishes between regional and non-regional facilities, various Sections of the Act require that the owner/operator of a pollution control

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[6] *Philadelphia v. New Jersey*, 437 U.S. 617, 618, 98 S.Ct. 2531 (1978).

facility such as a waste transfer station define the service area. For example, Section 39.2(a)(i) requires the applicant to show "the facility is necessary to accommodate the waste needs of the area it is intended to serve." 415 ILCS 5/39.2(a)(i) (2002). In fact, the appellate court has held that "it is the applicant who defines the intended service area, not the local decision making body." *Metropolitan Waste Syst., Inc. v. PCB*, 201 Ill. App. 3d 51, 558 N.E.2d 785, 787 (Aug. 7, 1990). Further, the Board has affirmed a local siting authority's approval even where agreeing that the applicant's service area was "loosely defined." *St. Clair County v. Village of Sauget, et al.*, PCB 93-51, slip op. at 13 (Jul. 1, 1993).

For the reasons discussed above, the Board also does not agree that the contested permit language is null and void because the permit was issued under the authority of a section of the Act that no longer exists. Pet. Mot. at 2. It was United Disposal's choice to limit the facility's service area to within municipal boundaries of the Village of Bradley. The limitation was not unconstitutional when the Agency issued United Disposal's development and operating permits, and it is not unconstitutional now. The Board finds that *Tennsu, Inc.* does not apply to render the contested language of condition #9 unconstitutional, null, or void.

Timeliness of the Agency's Denial Letter

The Board finds United Disposal's application for modification of its operating permit complete as a matter of law. Section 807.205(f) of the Board's rules provides that an application is not deemed filed until the Agency has received all the necessary information required under Part

807 of the Board's rules. The Agency must notify the applicant within 30 days after receipt of an application for an operating permit that the application is incomplete, or the application is considered filed on the date the Agency received the application.

Here, the Agency received the application on March 31, 2003, and issued a denial letter on May 15, 2003, 45 days after it received the application. The Agency argues that the May 15, 2003 denial letter was timely because it deemed United Disposal's request an application for a development, rather than operating, permit modification giving the Agency 45 days to notify the applicant of incompleteness under Section 807.205(f). However, both the application and denial letter clearly refer to United Disposal's request as an application to modify the facility's operating permit. The Board finds the Agency's denial letter untimely and deems United Disposal's application complete and filed as of March 31, 2003.

This does not, however, end the Board's inquiry, as the Board cannot direct Agency issuance of a permit that would violate the Act or Board regulations. The Agency's March 15, 2004 letter denied United Disposal's application as incomplete pursuant to Section 807.205(i). However, it is clear from the record and the parties' arguments that the primary reason for the Agency's denial is the lack of Section 39.2 siting approval. Even the Agency's denial letter states that "the nature of the request made in the permit application requires that the applicant provide proof of local siting approval as described in Section 39.2 of the Act and therefore is not sufficient proof of siting approval as required by Section 39(c) of the Act." For these reasons the Board finds that deeming United Disposal's application complete as a matter of law is not dispositive

of the siting approval issue. Below the Board discusses whether United Disposal's permit could issue without local siting approval.

Need for Local Siting Approval

Next, the Board determines whether the Agency properly denied United Disposal's application for lack of local siting approval. The Agency argues it denied United Disposal's application to modify the facility's operating permit because the nature of the requested change requires United Disposal to also modify the facility's development permit. The Agency reasons that by increasing the facility's service area, the facility qualifies as a "new pollution control facility" under either Section 3.330(b)(1) or (2) of the Act. The Agency next argues that Section 39(c) of the Act requires any new pollution control facility seeking a development or construction permit to submit proof of local siting approval.

The Agency claims it considered United Disposal's application an application for a development permit, but provides no support for this reasoning. The Agency simply states that because the facility seeks to increase its service area, the facility qualifies as a new pollution control facility. Nonetheless, the Board agrees that Board regulations require that before the Agency may issue an operating permit for a solid waste management facility, the applicant must submit proof that the facility conforms to all conditions contained in the development permit. 35 Ill. Adm. Code 807.207(c). Therefore, here, before the Agency may grant United Disposal an operating permit without a limited service area, United Disposal must request the same modification to its development permit. Any

requested modification to the development permit must show compliance with the Act and Board rules.

While not every request for modification of an operating permit requires siting or "re-siting," the Board finds that the nature of the change United Disposal seeks does require proof of local siting approval. The Board finds that by seeking to modify its development permit, United Disposal qualifies as a new pollution control facility because it seeks to engage in the transfer of waste, after July 1, 1981, without having received local siting approval.

The statute effective in 1994 when United Disposal applied for and received its development permit, exempted the facility from the definition of "regional pollution control facility," and thus, the requirement of local siting approval. United Disposal began operating the waste transfer station on December 5, 1994. The General Assembly amended the Act, removing the distinction between regional and non-regional pollution control facilities from Sections 39.2, 3.32, and 22.14, by Public Act 88-681, effective December 22, 1994.

The parties agree that the transfer station meets the definition of a pollution control facility, but the record is clear that the Agency has never permitted the facility as a pollution control facility as the Act currently defines that term. Even though the Agency issued United Disposal an operating permit after the public act eliminating the exemption became effective, the Agency takes the position that laws effective after the facility became operational do not apply. *See* AR. at 76 (Agency determined that the prohibition against locating waste transfer stations within 1,000 feet of any dwelling, effective December 22, 1994, was not applicable to United Disposal's facility). On its

face, the operating permit, issued after the siting exemption was eliminated, indicates that siting certification was unnecessary because the Agency considered the facility non-regional. AR. at 89.

United Disposal now seeks to remove the language limiting the facility's service area from the operating permit; the language that initially exempted the facility from local siting review. The Board finds that by removing the contested language from both the facility's development and operating permits, the facility falls within the current definition of a pollution control facility. Read together, Sections 3.330(b)(1) and 39(c) of the Act require that all pollution control facilities initially developed after the date of July 1, 1981 submit proof of Section 39.2 local siting approval. 415 ILCS 5/3.330(b)(1). Accordingly, the Board affirms the Agency's denial of United Disposal's requested permit modification for lack of proof of local siting approval.

In support of this conclusion, the Board notes that in the past, the Agency has required that a waste transfer facility wishing to "regionalize," or expand its service area, show proof of local siting approval. *Continental Waste Industries of Illinois, Inc. v. City of Mount Vernon*, PCB 94-138 (Oct. 27, 1994). In *Continental Waste*, the applicant appealed the local siting authority's denial of its request to expand the service area of its existing facility. The applicant did not seek to change the operation of the facility, but the expansion requested would have allowed the facility to receive and handle 20% more waste at the site.[6] At the time the applicant sought to regionalize, the Act

[6] City of Mount Vernon's brief at page 3.

still provided an exemption from local siting review for non-regional facilities. In affirming the siting authority's denial, the Board noted:

> The grant of permits by the Agency for a local pollution control facility is based on a review of similar factors as considered by the local governmental body in reviewing the siting application. However, the mere existence of a permit does not prohibit a finding by the local governmental body that the facility may threaten the public, health, safety and welfare. The Board finds that the findings of the Agency and the local governmental body are two independent decisions. *Continental Waste Ind.*, PCB 94-138, slip op. at 13 (Oct. 27, 1994).

Like the permittee in *Continental Waste*, United Disposal seeks to expand the service area limits of its existing waste transfer facility. The Board notes that although United Disposal is currently permitted, the nature of the change that United Disposal seeks may impact the criteria a local siting authority considers in determining whether to site, or re-site, a pollution control facility. The Board has received many public comments in support of United Disposal's requested permit modification. Nonetheless, the Board will not deprive the local siting authority of its statutory right and obligation to review the service area expansion under the procedures of Section 39.2 of the Act.

Conclusion

The Board finds the Agency properly denied United Disposal's application. The nature of United Disposal's

requested modification requires that the contested language be removed from both the facility's development and operating permits. By applying for a development permit, the waste transfer station falls under the Act's definition of a new pollution control facility. As a result, the Board finds the petitioners' requested modification requires proof of Section 39.2 local siting approval.

ORDER

The Board affirms the Agency's May 15, 2003 denial of a permit modification requested by United Disposal of Bradley, Inc. and Municipal Trust & Savings Bank, as Trustee Under Trust 0799. The Board grants the Agency's motion for summary judgment, and denies petitioners' motion.

IT IS SO ORDERED.

Chairman J.P. Novak abstained.

Section 41(a) of the Environmental Protection Act provides that final Board orders may be appealed directly to the Illinois Appellate Court within 35 days after the Board serves the order. 415 ILCS 5/41(a) (2002); *see also* 35 Ill. Adm. Code 101.300(d)(2), 101.906, 102.706. Illinois Supreme Court Rule 335 establishes filing requirements that apply when the Illinois Appellate Court, by statute, directly reviews administrative orders. 172 Ill. 2d R. 335. The Board's procedural rules provide that motions for the Board to reconsider or modify its final orders may be filed with the Board within 35 days after the order is received. 35 Ill. Adm. Code 101.520; *see also* 35 Ill. Adm. Code 101.902, 102.700, 102.702.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above opinion and order on June 17, 2004, by a vote of 4-0.

/s/ Dorothy M. Gunn
Dorothy M. Gunn, Clerk
Illinois Pollution Control Board

SUPREME COURT OF ILLINOIS
CLERK OF THE COURT
SUPREME COURT BUILDING
SPRINGFIELD, ILLINOIS 62701
(217) 782-2035

May 24, 2006

Ms. Jennifer J. Sackett Pohlenz
Querrey & Harrow, LTD.
175 West Jackson Boulevard
Suite 1600
Chicago, IL 60604

No. 102168 – United Disposal of Bradley, Inc., et al., petitioners, v. The Pollution Control board et al., respondents. Leave to appeal, Appellate Court, Third District.

The Supreme Court today DENIED the petition for appeal as a matter of right or leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on June 15, 2006.

[LOGO] State of Illinois
ENVIRONMENTAL PROTECTION AGENCY

Mary A. Gade, Director

2200 Churchill Road,
Springfield, IL 62794-9276

217/524-3300

January 19, 1995

OWNER
Merlin Karlock
Municipal Trust and
Savings Bank
(as Trustee under Trust
No. 0799)
Post Office Box 146
Bourbonnais, Illinois 60914

OPERATOR
Michael Watson
United Disposal of Bradley, Inc.
1000 East Liberty
Bradley, Illinois 60915

Re: 0910200013 – Kankakee County
United Disposal of Bradley, Inc. (Transfer Station)
Permit No. 1994-306-OP
Log No. 1994-558
Permit File

Dear Mr. Karlock and Mr. Watson:

Permit is hereby granted to Municipal Trust and Savings Bank (i.e., as Trustee under Trust No. 0799), as owner, and United Disposal of Bradley, Inc., as operator, to operate a solid waste management facility consisting of approximately 4.7 acres in Section 28, Township 31 North, Range 12 east of the 3rd Principal Meridian, Kankakee County, Illinois all in accordance with the applications and plans prepared by Bert Fowler Engineers. Final plans, specifications, application and supporting documents as submitted and approved shall constitute part of this permit and are identified on the records of the Illinois Environmental Protection Agency, Bureau of Land by the

permit number(s) and log number(s) as designated in the heading above.

Specifically, Permit No. 1994-306-OP approves operation of a municipal solid waste transfer station pursuant to Sections 21(d) and 39(a) of the Illinois Environmental Protection Act (hereinafter the Act) and 35 Illinois Administrative Code, Subtitle G (hereinafter 35 Ill. Adm. Code) 807.201, 807.202 and 807.207.

The permit is issued subject to the standard conditions attached hereto and incorporated herein by reference, and further subject to the following special conditions. In case of conflict between the application and plans submitted and these special conditions, the special conditions of this permit shall:

A. DEVELOPMENT

1. This permit is issued with the expressed understanding that no process discharge to Waters of the State or to a sanitary sewer in Illinois will occur from these facilities, except as authorized by a permit from the Bureau of Water (BOW). No waste may be accepted at the transfer station such that a waste water will be created needing a permit from the BOW prior to obtaining such permit.

2. Permittee shall notify the Agency of any changes from the information submitted to the Agency in its application for a Development and Operating permit for this site. Permittee shall notify the Agency of any changes in the names or addresses of both beneficial and legal titleholders to the

herein-permitted site. Such notification shall be made in writing within fifteen (15) days of such change and shall include the name or names of any parties in interest and the address of their place of abode; or, if a corporation, the name and address of its registered agent.

3. Site surface drainage, during development, during operation and after the site is closed, shall be such that no adverse effects are encountered by adjacent property owners.

4. The best available technology (mufflers, berms and other sound shielding devices) shall be employed to minimize equipment noise impacts on property adjacent to the site during both development and operation.

B. OPERATION

1. Waste may be received at this facility only Monday through Saturday, 6:00 AM to 5:00 PM.

2. If it is required for the facility to be open beyond normal operating hours to respond to emergency situations, a written record of the date(s), times and reason the site was open shall be made a part of the operating record for the site. The IEPA-FOS Regional Office shall be notified of the situation as soon as possible.

3. Fire safety equipment (fire extinguishers) shall be maintained in accordance with recommended practice.

4. At the end of each day of operation, all waste shall be removed from the tipping

floor. The tipping floor shall be swept to remove all waste. Waste may be left at the site overnight, however, it shall be in a covered container or waste collection vehicle. No waste shall remain at the site when the site is not scheduled to be open the following day.

5. A vector control specialist shall inspect the transfer station building at least quarterly. If necessary, vector control measures shall be taken.

6. The facility must maintain a contingency plan that allows for the management of leaky containers. This plan must include, but is not limited to, shipping and handling damaged containers first. Containers which are not open to the atmosphere and therefore minimize leachate generation must be utilized.

7. Recyclable materials shall be removed whenever their respective containers are full, or at least monthly.

8. Special waste (leachate) generated at the site for disposal, storage, incineration or further treatment elsewhere shall be managed in accordance with the Agency's Special Waste Authorization system and manifest system, as applicable.

9. No waste generated outside the municipal boundaries of the Village of Bradley may be accepted at this facility. Furthermore, no waste, meeting the definition of "special waste" given in Section 3.45 of the Act (including "hazardous waste" as defined in Section

3.15 of the Act), may be accepted at this facility.

10. Management of unauthorized waste.

    a. Landscape waste found to be mixed with municipal waste shall be removed the same day and transported to a facility that is operating in accordance with the Illinois Environmental Protection Act (the Act), Title V, Sections 21 and 39.

    b. Lead-acid batteries mixed with municipal waste will be removed the same day and transported either to a drop-off center handling such waste, or to a lead-acid battery retailer.

    c. Special wastes including hazardous waste, non-hazardous special waste, and potentially infectious medical waste mixed with municipal waste shall be containerized separately and removed as soon as possible by a licensed special waste hauler. Special wastes shall be transported to a licensed special waste management facility that has obtained authorization to accept such waste. The operator shall maintain a contract with haulers so that the immediate removal is ensured. The operator shall develop an emergency response/action plan for such occurrences.

    d. Asbestos debris from construction-demolition shall be managed in accordance with the National Emission

Standards for Hazardous Air Pollutants (NESHAPS) regulations.

e. Beginning July 1, 1994, tires found to be mixed with municipal waste shall be removed and managed in accordance with Section 55 of the Act.

f. Beginning July 1, 1994, white good components mixed with municipal waste shall be removed and managed in accordance with Section 22.28 of the Act.

g. Potentially Infectious Medical Waste (PIMW) found to be mixed with municipal waste shall be managed in accordance with 35 Ill. Adm. Code, Subtitle M.

h. After the unauthorized waste has been removed from the transfer station, a thorough cleanup of the affected area will be made according to the type of unauthorized waste managed. Records shall be kept for three years and will be made available to the IEPA-BOL upon request.

C. CLOSURE PLAN

1. The closure plan approved by Pemrit [sic] No. 1994-306-DE remains in effect in accordance with 35 Ill. Adm. Code, Part 807.

2. The operator shall notify the Agency within 30 days after receiving the final volume of waste.

3. When the transfer station is no longer to be used for municipal waste, the operator shall initiate implementation of the closure plan within 30 days after the site receives its final volume of waste.

4. The operator shall not file any application to modify the closure plan less than 180 days prior to receipt of the final volume of waste.

5. Upon completion of closure activities, the operator will notify the Agency that the municipal waste transfer station has been closed in accordance with the approved closure plan utilizing the Agency's "Affidavit for Certification of Completion of Closure of Non-Hazardous Waste Facilities."

D. OTHER CONDITIONS

1. Any modification to the facility shall be the subject of an application for supplemental permit for site modification submitted to this Agency.

2. This permit is subject to review and modification by the Agency as deemed necessary to fulfill the intent and purpose of the Environmental Protection Act, and all applicable environmental rules and regulations.

The original and two (2) copies of all certifications, logs or reports and three (3) copies of groundwater monitoring chemical analysis forms which are required to be submitted to the Agency by the permittee should be mailed to the following address:

Illinois Environmental Protection Agency
Planning and Reporting Section

Bureau of Land – #24
2200 Churchill Road
Post Office Box 19276
Springfield, Illinois 62794-9276

Within 35 days after the notification of the final permit decision the applicant may petition for a hearing before the Illinois Pollution Control Board to contest the decision of the Agency.

Sincerely,

/s/ Edwin C. Bakowski, P.E.
Edwin C. Bakowski
Solid Waste Branch Manager
Permit Section, Bureau of Land

ECB:CL:kw/609W, 1-5, sp[KES]
[CJL]

cc: Bert Fowler, P.E.; Bert Fowler Engineers
Chris Etcheson; Kankakee County Health Department

bcc: Bureau File
Maywood Region
P&RS
FOS (Churchill)
Chris Liebman

STANDARD CONDITIONS FOR CONSTRUCTION/ DEVELOPMENT PERMITS ISSUED BY THE ILLINOIS ENVIRONMENTAL PROTECTION AGENCY

July 1, 1979

The Illinois Environmental Protection Act (Illinois Revised Statutes, Chapter 111-1/2, Section 1039) grants the Environmental Protection Agency authority to impose conditions on permits which it issues.

These standard conditions shall apply to all permits which the Agency issues for construction or development projects which require permits under the Divisions of Water Pollution Control, Air Pollution Control, Public Water Supplies, and Land and Noise Pollution Control. Special conditions may also be imposed by the separate divisions in addition to these standard conditions.

1. Unless this permit has been extended or it has been voided by a newely [sic] issued permit, this permit will expire two years after date of issuance unless construction or development on this project has started on or prior to that date.

2. The construction or development of facilities covered by this permit shall be done in compliance with applicable provisions of Federal laws and regulations, the Illinois Environmental Protection Act, and Rules and Regulations adopted by the Illinois Pollution Control Board.

3. There shall be no deviations from the approved plans and specifications unless a written request for modification of the project, along with plans and specifications as required, shall have been submitted to the Agency and a supplemental written permit issued.

4. The permittee shall allow any agent duly authorized by the Agency upon the presentation of credentials:

    a. to enter at reasonable times the permittee's premises where actual or potential effluent, emission or noise sources are

located or where any activity is to be conducted pursuant to this permit.

b. to have access to and copy at reasonable times any records required to be kept under the terms and conditions of this permit.

c. to inspect at reasonable times, including during any hours of operation of equipment constructed or operated under this permit, such equipment or monitoring methodology or equipment required to be kept, used, operated, calibrated and maintained under this permit.

d. to obtain and remove at reasonable times samples of any discharge or emission of pollutants.

e. to enter at reasonable times and utilize any photographic, recording, testing, monitoring or other equipment for the purpose of preserving, testing, monitoring, or recording any activity, discharge, or emission authorized by this permit.

5. The issuance of this permit:

a. shall not be considered as in any manner affecting the title of the premises upon which the permitted facilities are to be located;

b. does not release the permittee from any liability for damage to person or property caused by or resulting from the construction, maintenance, or operation of the proposed facilities;

c. does not release the permittee from compliance with other applicable statutes and regulations of the United States, of the State of Illinois, or with applicable local laws, ordinances and regulations;

d. does not take into consideration or attest to the structural stability of any units or parts of the project;

e. in no manner implies or suggests that the Agency (or its officers, agents or employees) assumes any liability, directly or indirectly, for any loss due to damage, installation, maintenance, or operation of the proposed equipment or facility.

6. Unless a joint construction/operation permit has been issued, a permit for operating shall be obtained from the Agency before the facility or equipment covered by this permit is placed into operation.

7. These standard conditions shall prevail unless modified by special conditions.

8. The Agency may file a compliant [sic] with the Board for modification, suspension or revocation of a permit:

a. upon discovery that the permit application contained misrepresentations, misinformation or false statements or that all relevant facts were not disclosed; or

b. upon finding that any standard or special conditions have been violated; or

c. upon any violation of the Environmental Protection Act or any Rule or Regulation effective thereunder as a result of the construction or development authorized by this permit.

No. 3-04-0536

IN THE

APPELLATE COURT OF ILLINOIS

THIRD JUDICIAL DISTRICT

UNITED DISPOSAL OF BRADLEY, INC., and MUNICIPAL TRUST & SAVINGS BANK as Trustee under Trust 0799, Petitioners-Appellants, v. THE POLLUTION CONTROL BOARD And THE ENVIRONMENTAL PROTECTION AGENCY, Respondents-Appellees.	No.: PCB 03-235 Appeal from a Decision of the Illinois Pollution Control Board

AFFIDAVIT OF INTENT TO PETITION FOR LEAVE TO APPEAL UNDER SUPREME COURT RULE 315, AND ALTERNATIVELY RULE 317 OF PETITIONER-APPELLANTS UNITED DISPOSAL OF BRADLEY, INC. AND MUNICIPAL TRUST & SAVINGS BANK AS TRUSTEE UNDER TRUST 0799

(Filed Feb. 1, 2006)

I, Jennifer J. Sackett Pohlenz, being first duly sworn upon my oath, depose and state as follows:

1. I am an attorney with Querrey & Harrow, Ltd., and am the attorney primarily responsible for representing the Petitioner-Appellants United Disposal of Bradley,

Inc. and Municipal Trust & Savings Bank as Trustee under Trust 0799 in this appeal.

2. On January 13, 2006, this Court issued an opinion affirming the decision of the Illinois Pollution Control Board.

3. The Petitioner-Appellants intend to timely file a petition for leave to appeal this Court's opinion affirming the decision of the Illinois Pollution Control Board, to the Illinois Supreme Court pursuant to Supreme Court Rule 315, and alternatively Rule 317, on or before February 17, 2006.

FURTHER AFFIANT SAYETH NAUGHT.

/s/ Jennifer J. Pohlenz
Jennifer J. Sackett Pohlenz

SIGNED and SUBSCRIBED to before me this 1st day of February, 2006.

/s/ Catherine A. Weingart-Ryan
Notary Public

"OFFICIAL SEAL"
CATHERINE A. WEINGART-RYAN
Notary Public, State of Illinois
My Commission Expires April 29, 2008

TENNSV, INC., a Delaware Corporation, and G.J. LEASING COMPANY, INC., d/b/a CAHOKIA MARINE SERVICE, a Missouri Corporation, Plaintiffs, v. MARY A. GADE, Director, Illinois Environmental Protection Agency, and THE ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, Defendants. OCON, TENNSV, INC., and VLP CORPORATION, Plaintiffs, and CONSOLIDATED RAIL CORPORATION, Plaintiff-Intervenor, v. SCOTT PENNY, FAIRMONT CITY, ILLINOIS, MARY A. GADE, ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, and THE STATE OF ILLINOIS, Defendants.

NO. 92 503 WLB, NO. 92 522 WLB

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS

1993 U.S. Dist. LEXIS 10403; 24 ELR 20019

July 8, 1993, Decided
July 8, 1993, Filed

JUDGES: BEATTY

OPINION BY: WILLIAM L. BEATTY

OPINION:

ORDER

Two lawsuits have been filed with the court challenging the constitutionality of certain provisions of the Illinois Environmental Protection Act (IEPA or the Act). In each of these lawsuits, the parties have submitted stipulated facts and have requested that the court rule on the constitutionality of the Act as it applies to these facts. The factual background of these lawsuits are similar and the constitutional issues raised are identical. Therefore, for purposes

of this Order and decision only, causes No. 92-503 and No. 92-522 are consolidated.

The stipulated facts are lengthy and will not be repeated here. In summary, these cases involve the shipment of municipal solid waste (MSW) generated outside of the State of Illinois which is brought into the State of Illinois for its ultimate disposal. The Plaintiffs do not operate landfills. Instead, the Plaintiffs are involved in the shipment, conveyance, unloading, or loading of MSW generated outside of the State of Illinois. The Defendants interrupted the business of the Plaintiffs by citing the Plaintiffs for violations of the IEPA.

The Plaintiff's constitutional challenge to the Act is twofold. First, the Plaintiffs allege that the Act discriminates between operations handling out-of-state MSW and operations handling locally generated MSW in a manner which violates the Commerce Clause. Second, the Plaintiffs allege that the Act's regulation of MSW generated outside of the State of Illinois is preempted by various federal regulations and is therefore unconstitutional under the Supremacy Clause.

The Plaintiffs challenge the application of IEPA Sections 39.2, 3.32, and 22.14 to their business activities. Section 39.2[1] requires that every Regional Pollution Control Facility (RPCF) obtain local siting approval prior

[1] "The county board of the county or the governing body of the municipality, as determined by paragraph (c) of Section 39 of this Act, shall approve or disapprove the request for local siting approval for each regional pollution control facility which is subject to review." 415 ILCS 5/39.2(a) (formerly Ill.Rev.Stat. ch. 111 1/2, P 1039.2(a) (1992)).

to its operation. An RPCF is defined in Section 3.32[2] as "any waste storage site, sanitary landfill, waste disposal site, waste transfer station, waste treatment facility or waste incinerator that accepts waste from or that serves an area that exceeds or extends over the boundaries of any local general purpose unit of government." Section 22.14(a)[3] restricts the location of RPCFs, but does not restrict the location of facilities which do not fall within the definition of an RPCF. The Act, therefore, establishes a statutory scheme which distinguishes between facilities located outside the geographical boundaries of a general

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[2] "Regional pollution control facility" is any waste storage site, sanitary landfill, waste disposal site, waste transfer station, waste treatment facility or waste incinerator that accepts waste from or that serves an area that exceeds or extends over the boundaries of any local general purpose unit of government. . . .

The following are not regional pollution control facilities:

(1) sites or facilities located within the boundary of a local general purpose unit of government and intended to serve only that entity; . . . *415 ILCS 5/3.32* (1992) (formerly Ill.Rev.Stat. ch. 111 1/2, P 10003.32 (1992).

[3] No person may establish any regional pollution control facility for use as a garbage transfer station, which is located less than 1000 feet from the nearest property zoned for primarily residential uses or within 1000 feet of any dwelling, except in counties of at least 3,000,000 inhabitants. In counties of at least 3,000,000 inhabitants, no person may establish any regional pollution control facility for use as a garbage transfer station which is located less than 1000 feet from the nearest property zoned for primarily residential uses, provided, however, a station which is located in an industrial area of 10 or more contiguous acres may be located within 1000 feet but no closer than 800 feet from the nearest property zoned for primarily residential uses. However, in a county with over 300,000 and less than 350,000 inhabitants, a station used for the transfer or separation of waste for recycling or disposal in a sanitary landfill that is located in an industrial area of 10 or more acres may be located within 1000 feet but no closer than 800 feet from the nearest property zoned for primarily residential uses. 415 ILCS 5/22.14(a) (1992) (formerly Ill.Rev.Stat. ch. 111 1/2, P 1022.14(a) (1992)).

purpose unit of government and those which are not so located.

In *Fort Gratiot Landfill v. Michigan Dept. of Nat. Res.*, 119 L. Ed. 2d 139, 112 S. Ct. 2019 (1992), the Court noted that the "negative" or "dormant" aspect of the Commerce Clause prohibits States from advancing their own commercial interests by curtailing the movement of articles of commerce, either into or out of the state. *Fort Gratiot Landfill v. Michigan Dept. of Nat. Res.*, 119 L. Ed. 2d 139, 112 S. Ct. 2019, 2023 (1992). The Court held that "[a] state statute that clearly discriminates against interstate commerce is therefor unconstitutional 'unless the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism.'" *Id.* at 2023-24 (quoting *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 274, 108 S. Ct. 1803, 1808, 100 L. Ed. 2d 302 (1988)).

The proffered justification for the statutory distinction and the different requirements for RPCFs is that these distinctions are necessary to protect the public health and safety. While the court agrees that concerns for the public health and safety are valid factors unrelated to economic protectionism, the Defendants bear the burden of proving that the [sic] this statutory scheme furthers health and safety concerns in a manner that cannot be adequately accomplished through a nondiscriminatory alternative. *Id.* at 2027. The Defendants have failed to do so. The Defendants have offered no proof that MSW generated outside the boundaries of any local general purpose unit of government poses any different health risks to the public than MSW generated locally. Absent such proof, there exists no valid factor to justify the discriminatory effect of the statutory scheme. The establishment of RPCFs and the restrictions

placed on these facilities, therefore, violates the Commerce Clause. *Id.* at 2023.

Furthermore, the intent of the legislature to provide a system to balance state and local interests does not cure the discriminatory effect of the challenged provisions of the IEPA. "[A] State (or one of its political subdivisions) may not avoid the strictures of the Commerce Clause by curtailing the movement of articles of commerce through subdivisions of the State, rather than through the State itself." *Id.* at 2024.

The Plaintiffs also argue that Section 21(e)[4] violates the Commerce Clause. The court will address this contention bearing in mind that the court has declared that portions of Sections 39.2, 3.32, and 22.14(a) are unconstitutional as applied to interstate MSW. Thus, the court will interpret Section 21(e) vis-a-vis the remaining sections of the IEPA.

Section 21(e) states that all persons must dispose, treat, store, and not abandon any waste, except at sites or facilities which meet the requirements of the IEPA. It applies to intrastate, interstate, and facilities located within the boundary of a local general purpose unit of government and intended to serve only that entity. Therefore, in the absence of Sections 39.2, 3.32 and 22.14(a), Section 21(e) does not discriminate against interstate commerce in violation of the Commerce Clause.

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[4] "No person shall: (e) Dispose, treat, store or abandon any waste, or transport any waste into this State for disposal, treatment, storage or abandonment, except at a site or facility which meets the requirements of this Act and of regulations or standards adopted by the Board." 415 ILCS 5/21(e) (1992) (formerly Ill.Rev.Stat. ch. 111 1/2, P 1021(e) (1992)).

The Plaintiffs' second constitutional challenge is based on preemption under the Supremacy Clause. The Plaintiffs argue that certain provisions of the EPA are preempted by the Staggers Rail Act, DOT regulations, and ICC regulations. The Plaintiffs, while referring to the Staggers Rail Act, the DOT regulations and the ICC regulations, do not point to any specific sections which give rise to a valid preemption argument under the Supremacy Clause. The Plaintiffs have failed to establish that this statute or these regulations explicitly or implicitly encompass the entire field of MSW disposal, storage, treatment, or transfer, or that the IEPA conflicts with these federal authorities. *Gade v. National Solid Wastes Management Ass'n*, 120 L. Ed. 2d 73, 112 S. Ct. 2374, 2383 (1992). The court, therefore, has no basis upon which to hold that the state's exercise of its legitimate police power is preempted by federal law.

Accordingly, IEPA Sections 39.2, 2.32, and 22.14(a) are unconstitutional as applied to interstate MSW. Nothing has been presented to the court to establish that the Staggers Rail Act, the DOT regulations, or the ICC regulations preempt any portion of the IEPA.

IT IS SO ORDERED.

DATED: This 8th day of July, 1993.

WILLIAM L. BEATTY
UNITED STATES DISTRICT JUDGE